U.S. Department of Labor

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Issue Date: 15 February 2005

CASE NOS. 2004-SOX-60
2004-SOX-61
2004-SOX-62

IN THE MATTER OF:

PATRICIA A. ALLEN
LAURA L. WALDON
DANA BREAUX

Complainants

v.

STEWART ENTERPRISES, INC.

Respondent

APPEARANCES:

WILLIAM REINHARDT, JR., ESQ.
DARA MASON, ESQ.

For Complainants

REBECCA GOTTSEGAN, ESQ.
SHELBEY M. SULLIVAN, ESQ.

For Respondent

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Sarbanes-Oxley Act enacted on July 30, 2002, technically known as the Corporate and Criminal Fraud Accountability Act, Public Law 107-204, 18 U.S.C. § 1514A, et seq., (herein SOX or the Act), and the regulations promulgated thereunder at 29 C.F.R. Part 1980, which are employee protective provisions. This statutory provision prohibits any company with a class of securities registered under § 12 of the Security Exchange Act of 1934, or required to file reports under § 15(d) of the same Act, or any officer, employee or agent of such company, from discharging, harassing, or in any other manner discriminating against an employee in the terms and conditions of employment because the employee provided to the employer or Federal Government information relating to alleged violations of 18 U.S.C. §§ 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission (herein SEC), or any provision of Federal law relating to fraud against shareholders.

I. PROCEDURAL BACKGROUND

Patricia A. Allen, Laura L. Waldon and Dana Breaux, Complainants, filed a request for hearing with the Office of Administrative Law Judges on June 22, 2004, as a result of a May 5, 2004 dismissal of their complaints by the Occupational Safety and Health Administration, U. S. Department of Labor.

Pursuant to the Notice of Hearing and Pre-Hearing Order which issued in this matter on July 2, 2004, a formal hearing was scheduled to commence in Metairie, Louisiana on August 30, 2004. (ALJX-5).[1] After six days of hearing, the record was closed on September 7, 2004. All parties were afforded a full opportunity to adduce testimony, offer documentary exhibits, submit oral argument and file post-hearing briefs. The following exhibits were received into evidence: Administrative Law Judge Exhibits 1-7; Complainants' Exhibits 1-6, 8-9, 12, 15-17, 22, 26-27, 30-31, 33-35, 51-53, 55-57, 59-60, 68, 72, 75-78, 80-82, 92-94, 98-99 and 102; and Respondent's Exhibits 1-2, 4-7, 11-15, 20-30, 34-35, 38, 47-48, 56-59 and 61-62. A brief due date, as extended, was November 15, 2004. Post-hearing briefs were received from Complainants and Respondent.

Complainants filed a 52-paragraph Complaint alleging the nature of each violation as well as the relief they seek in this case. (ALJX-4). On July 19, 2004, Respondent filed its Answer and Defenses. (ALJX-6).

The parties stipulated that Respondent is a publicly traded company with a class of securities registered pursuant to Section 12 of the Securities and Exchange Commission Act of

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Complainants' Exhibits: CX-___; and Respondent's Exhibits: RX-___; and Administrative Law Judge Exhibits: ALJX-___.

1934, and required to file reports pursuant to Section 15(d) of the Act. (Tr. 11-12).

II. ISSUES

1. Whether Complainants engaged in protected activity within the meaning of the SOX Act?

2. Whether Complainants suffered an adverse action because of their alleged protected activity?

3. Assuming Complainants engaged in protected activity, whether their activity was a contributing factor in Respondent's alleged discrimination against Complainants?

4. Whether Respondent has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action irrespective of Complainants having engaged in protected activity?

III. SUMMARY OF THE EVIDENCE

Laura Waldon

Ms. Waldon is a complainant in the present matter. She testified at the formal hearing and was deposed by the parties on July 26, 2004. (RX-55). Ms. Waldon has a Bachelor of Science degree in management accounting and has been a licensed CPA in Missouri since 1999. She began working permanently in the funeral industry in 1986 with D.W. Newcomer and Sons (Newcomer) in Kansas City, Missouri. Ms. Waldon was employed with Newcomer for thirteen years and held the positions of data entry and accounts payable clerk, as well as controller. (Tr. 42-43). In April 1999, Newcomer was acquired by Stewart Enterprises.[2] (Tr. 45).

Ms. Waldon was employed as a controller at the time Stewart acquired Newcomer. Approximately one year after the acquisition, Ms. Waldon became Director of Operations and reported to Gary Davis, the "COO" of the Midwest Region. Ms. Waldon was involved with the Central Division and was located in Kansas City, Missouri.[3] (Tr. 46).

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[2] The Funeral Security Plan (FSP) accounts held by Newcomer were not entered into the Stewart system and were maintained on their original system. (Tr. 45).

[3] Stewart is divided into four operating divisions: Eastern, Western, Southern, and Central. (Tr. 46).

In January 2002, Ms. Waldon accepted the position of "finance manager" of the Central Division. Prior to accepting the position, she expressed an interest in becoming more involved with "operations." However, Mike Crane, the division president, told her that she did not have a future in "operations" because she was an accountant and was not located in New Orleans, Louisiana. (Tr. 47-48). Consequently, Ms. Waldon tendered her resignation and sought employment as controller with Case Supply Company. (Tr. 48, 150; RX-55, p. 9). On her last full day of employment with Stewart, she was offered the finance manager position without the position having been "posted."[4] (Tr. 47-48, 151).

In May 2003, Ms. Waldon became the Central Division Director of Administration (DOA) and relocated to New Orleans. (Tr. 46-47). As DOA, Ms. Waldon supervised three Record Management Centers (RMC) in the Central Division, located in New Orleans, Louisiana; in Kansas City, Missouri; and in Dallas, Texas. Ms. Waldon reported to Sharon Kirkpatrick, the Chief Financial Officer (CFO) for the Central Division. (Tr. 49-50). Ms. Kirkpatrick never had any criticism of Ms. Waldon's work. (Tr. 56). During her employment as DOA with Stewart, Ms. Waldon received good evaluations, received pay raises each year, and got along with her supervisors. (Tr. 151).

Ms. Waldon was familiar with Respondent's Code of Business Conduct which required employees to report any violations of any laws and provided that reporting employees would not be subject to acts of retaliation. According to the Code of Business Conduct, reports were to be made to the employee's supervisor. The employee could go above the supervisor if she was not satisfied with the manner in which the complaints were handled. Additionally, an employee could place an anonymous complaint on a hotline or could contact Mr. Rick McMillan, the audit committee's attorney. Ms. Waldon registered her complaints with Ms. Kirkpatrick, Mr. Crane, and Mr. Hymel, but did not complain to higher officials. (Tr. 154-155; RX-7, p. 12; RX-48, p. 19).

Ms. Waldon first began making complaints about trust reconciliation and compliance in 1999. (Tr. 171-172). Among the problems later identified by Ms. Waldon were inaccurate calculations and delayed refunds which put Stewart in violation

[4] Ms. Waldon testified that she understood Respondent's job posting policy to be that all available jobs were to be posted, unless "it was a reorganization of the department." (Tr. 49).

of Texas and Missouri state statutes.[5] (Tr. 50-52). Ms. Waldon was concerned that the delayed refunds would result in sanctions from the states, including revocation of Stewart's license. (Tr. 52). She expressed her concern to the following people: Ms. Kirkpatrick, Beau Royster, Patricia Beatty, Lenora Smith, Jim McLennan, Mike Hymel (head of the Accounting Department), and Mike Crane.[6] (Tr. 53, 78). According to Ms. Waldon, if a state revoked Stewart's license, such action would be reflected in the financial statement distributed to the shareholders and would adversely affect the shareholders. (Tr. 55).

Ms. Waldon does not have any knowledge of Stewart's license being revoked in Texas or Missouri, nor is she aware of the company being sanctioned in either state. However, Ms. Waldon testified the company "had a lot of problems in the State of Texas and received very low ratings."[7] In Missouri, complaints had been filed with the Board of Funeral Directors regarding FSP contracts and Stewart contracts with delayed refunds to which Respondent responded and had not been sanctioned. (Tr. 173-174).

Stewart has a Shared Services Center (SSC) where many administrative functions are consolidated. SSC handles accounts payable, accounts receivable, payroll, and calculations of payoffs and refunds. Ms. Beatty headed the team in charge of the calculation of payoffs and refunds at the time Ms. Waldon became DOA. (Tr. 50). Ms. Beatty reported to Lenora Smith. Ms. Waldon experienced problems obtaining information from SSC prior to moving to New Orleans, Louisiana in May 2003. In June 2003, Ms. Waldon requested the amortization schedule from Special Projects and her request was denied by Harold Vega and Ms. Beatty. She eventually received the amortization schedule on September 10, 2003. (Tr. 57-58; CX-34).

Respondent's computer system, the AS/400, could not correctly allocate payments between principal and interest. This resulted in an overcharge to the customer because interest was identified as earned when it was actually unearned. According to Ms. Waldon, the interest calculation errors were

[5] According to Ms. Waldon, Texas and Missouri state law required the issuance of refunds within 15 days and 30 day, respectively. Ms. Waldon testified Stewart was taking four to six weeks to issue refunds. (Tr. 52).

[6] Mr. Royster was the team leader of the Trust Department and Mr. McLennan was the head of the Shared Services Center (SSC). (Tr. 50, 53).

[7] Ms. Waldon did not know the rating given during the last audit, but "typically they received 3's and 4's, with 1 being best and 5 being worst." She obtained this information through working with the Trust Department and the Shared Services Center. (Tr. 174).

not limited to accounts where the customer overpaid. From her discussions with Ms. Beatty, Ms. Waldon understood that a correct interest calculation only occurred when a customer paid the exact amount that was due and paid on the due date. The errors caused by the AS/400 could result in either a credit balance or a debit balance.[8] (Tr. 64-66).

Ms. Waldon was concerned that Ms. Beatty did not know how to compute the refunds and that she used different formulas for computations. Based on her discussion with Ms. Beatty, Ms. Waldon believed Ms. Beatty only used the amortization schedule when someone complained about the amount shown on a contract; thus, she believed that there were contracts that were not amortized because neither the customer nor a field representative complained. Further, Ms. Waldon believed Ms. Beatty used different amortizations for different payoffs with no standard amortization table. (Tr. 58-60).

Ms. Waldon was not aware of any failure to refund money where a customer was overcharged and the specific account was "brought to someone's attention through a field or customer complaint." (Tr. 156). She was aware that Respondent was working on a solution to the interest calculation problem. She also understood that the company had Special Projects perform manual amortizations as an internal control until the computer problem was fixed. However, Ms. Waldon did not think the manual amortizations were intended to "catch" the problem; rather, the manual amortization was used if there was a customer complaint. (Tr. 157).

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[8] On January 10, 2003, Ms. Waldon received an e-mail from Mr. Crane that listed Information System (I.S.) projects, including "Interest Payment Application" and "Cash Update and Payoff Inquiry User Testing." Ms. Waldon affirmed that she believed the new system would correctly calculate prospective financial charges. (Tr. 170-171; CX-32). She did not believe the AS/400 was intentionally programmed incorrectly. (Tr. 171). On January 15, 2003, Ms. Waldon received an e-mail from Mr. McLennan stating that the system had been fixed to "generate the correct information in regards to finance charge through the payment application." (Tr. 90; CX-51). Subsequently, Ms. Waldon learned that the AS/400 still could not compute interest when a field representative phoned Ms. Waldon regarding a customer complaint on a refund. Ms. Waldon manually calculated and amortized the contract and obtained a different amount. She informed Ms. Kirkpatrick. No one informed the field representatives that they should not quote payoffs from the AS/400. (Tr. 93-94). Ms. Waldon testified she was aware that the new system had not been installed when she left Respondent in January 2004 because the testing phase revealed problems that needed to be fixed before implementation. (Tr. 210-211).

Ms. Waldon identified a problem with one account where the client had a pre-need contract and passed away.[9] The funeral home began services on the contract, but a premium was still due. The payoff amount used on the funeral contract was the amount the field brought up on the payoff screen. In an e-mail to Ms. Waldon, Ms. Beatty indicated that she would adjust the balance on the account to reflect the amount the customer had been quoted.[10] (Tr. 68). Ms. Waldon replied that she would submit an "adjustment transaction and a refund request" and that a refund should be issued to the customer because too much money was collected. Ms. Beatty responded that she would make the adjustments, but the adjustments would be counted as "errors" for Ms. Waldon's "group," which Ms. Waldon viewed as a form of retaliation.[11] (Tr. 68-70).

In June 2003, Ms. Beatty notified Ms. Waldon that the Texas-linked contracts in the system showed a credit balance on the payoff screen when no credit balance was due. According to Ms. Beatty, an amortization would have to be done anytime there was a payoff on those accounts. Ms. Beatty told Ms. Waldon that she could not provide a list of the problematic accounts from the AS/400 computer system. (Tr. 75-76). Ms. Smith showed Ms. Waldon how to "look it up on the screen" and determine if it was a Texas-linked contract that would require a manual amortization in order to determine the correct payoff amount. She affirmed that amortization was not a "secret" at that time. (Tr. 162-165). Ms. Waldon was lead to believe the problem only existed in Texas-linked contracts, but eventually realized the same problems existed with contracts in other states and that those contracts were being amortized as well. (Tr. 75-77, 168).

Ms. Waldon received the amortization table for the Texas-linked contract in June 2003. (Tr. 162). She received a blank amortization schedule in September 2003 because Special Projects wanted someone in the Central Division to start doing the amortizations. (Tr. 163-164). She was aware that other field representatives had also received the amortization schedule. (Tr. 166).

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[9] A "pre-need" contract is a contract for funeral and/or cemetery services entered into prior to the time of death. An "at-need" contract is one entered into after the death has occurred. If a person has a "pre-need" contract and then dies, the "pre-need" contract becomes a credit against the "at-need" contract. (Tr. 63).

[10] The e-mail correspondence between Ms. Waldon and Ms. Beatty is contained in Complainants' Exhibit No. 35. (CX-35).

[11] An employee's performance was based on a percentage of errors set forth in a monthly error report in an attempt to gain efficiency and perform tasks correctly. (Tr. 69).

Virginia Williams was the supervisor of the Central Division Customer Service team.[12] (Tr. 85). In June 2003, Ms. Williams received a phone call from Mr. McLennan informing her that she had sent out an e-mail containing incorrect information regarding "turnaround time for refunds by Special Projects." Mr. McLennan advised Ms. Williams that the "turnaround time" for Special Projects was 24 hours and that she should be more careful about what she puts in writing. Ms. Waldon contacted Ms. Kirkpatrick with her concern that both she and her employee were being threatened due to Mr. McLennan's wording and his intention to contact Ms. Waldon as well.[13] (Tr. 87-88).

The Securities Exchange Commission (SEC) issued Staff Accounting Bulletin No. 101 (SAB-101) which does not allow a company to recognize revenue from merchandise or services until there is physical delivery to the customer. With a pre-need policy, the merchandise and services would be considered deferred revenue and deferred cost until the time the services were needed. (Tr. 96). Prior to fiscal year 2001, commencing November 2000, revenue and costs were recognized at the time the premium contract was sold. With the implementation of SAB-101, the revenue and cost must now be recognized at the time of actual delivery. (Tr. 97). Ms. Waldon identified a screen print off of the AS/400 which showed the cost of an urn as $77.00 with an effective date of August 6, 2001. (CX-75, p. 1). The "detail delivery report" for the month of December 2003 showed the current cost of the urn as $77.00. According to Ms. Waldon, the urn is incorrectly accounted for under SAB-101 because the current cost should be the cost "as of today, as of the day it was delivered," as opposed to the cost of the urn at the time the contract was sold.[14] (Tr. 105-106; CX-75, p. 2).

Beau Royster is the head of internal audit at Stewart. Ms. Waldon worked with Mr. Royster to coordinate the FSP into the Stewart system when he was team leader of the Trust team. On an unspecified date, Ms. Waldon discussed SAB-101 accounting with Mr. Royster. She was told the company was "looking into it to see what needed to be done." She eventually learned the journal entries were being made to make the necessary adjustments in the

[12] Ms. Williams reported to Ms. Waldon and Ms. Waldon reported to Ms. Kirkpatrick. Mr. McLennan was in a separate division. (Tr. 86).

[13] On June 26, 2003, Ms. Williams sent an e-mail to Ms. Waldon and Ms. Kirkpatrick relating her conversation with Mr. McLennan. (CX-5). Mr. McLennan did not in fact contact Ms. Waldon. (Tr. 88).

[14] The document referenced by Ms. Waldon is a "Product Delivery Detail Report" for White Chapel Cemetery. (CX-75).

system during the third quarter of 2003, which ended July 2003. (Tr. 98-99, 101).

During a third quarter earnings call, one of the analysts inquired about the increased cost of merchandise. Ken Budde, the CFO of Stewart, responded that the increase was "an anomaly that they had not been able to get their arms around yet." Ms. Waldon believed Mr. Budde's statement was untrue because the adjustments were being made to bring Respondent into compliance with SAB-101. (Tr. 102). Through a discussion with John Ferguson in the Accounting Department, Ms. Waldon learned the company had made adjustments to the third quarter financial statements during the third quarter of 2003. (Tr. 103, 178). In the fourth quarter of 2003, the company made its fourth quarter adjustments, as well as the adjustments for the first and second quarters of that year. (Tr. 103, 178). Consequently, the company was in compliance with SAB-101 for fiscal year 2003. (Tr. 179). However, Ms. Waldon was concerned that the company had to make adjustments back to November 2000 to be fully in compliance for fiscal years 2001 and 2002, which Ms. Waldon believed the company had not done.[15] Mr. Ferguson told her there were no instructions to "make the entries in the prior years." (Tr. 103, 179). Ms. Waldon was also concerned that Stewart was making a manual adjustment to costs for 2003 with "additional journal entries." (Tr. 179). She acknowledged she did not know what "top-sided adjustment" meant. (Tr. 181).

After the third quarter earnings call, Ms. Waldon also spoke with Mr. Hymel, the head of the Accounting Department, regarding SAB-101. Ms. Waldon expressed concern that the Funeral Security Plan contracts could never be converted unless actual costs were adjusted, as opposed to making "journal entry adjustments." Ms. Waldon received assurances that Stewart was in the "process of making sure that the system could accommodate the adjustments to cost without negatively affecting anything else." (Tr. 104). The record does not reflect any complaints/concerns made by Ms. Waldon to Mr. Hymel about Respondent's failure to comply with SAB-101 for fiscal years 2001 and 2002. (Tr. 185). Ms. Waldon testified that the third quarter cumulative adjustments in 2003 for the Central Division resulted in a 3.5% difference greater than the cost for the previous year. (Tr. 108-109; CX-77).

The internal consolidated financial statements for the Central Division are not the statements submitted to the SEC,

[15] Fiscal year 2001 began in November 2000.

but rather working documents for managers to compare costs from year to year. (Tr. 180; CX-76; CX-77). Ms. Waldon was not aware of any SEC regulation that necessitated the company to have internal working documents which reflect financial statements for the Central Division. (Tr. 184). Ms. Waldon spoke to Mr. Hymel about the cost issues, but she did not ask whether manual adjustments were made for the fiscal years of 2001 and 2002 nor express any concerns about whether the costs were proper for fiscal years 2001 and 2002. She does not believe the improper recording of costs was done intentionally by Respondent. While she does not know of any specific federal law that is violated through the improper coding of costs, she does know that understating costs will result in an overstatement of the company's gross profit. (Tr. 185-186).

Ms. Waldon continued to complain about refunds and interest calculations after the June 2003 incident with Ms. Williams. She testified that she was "stonewalled" as a result of her continued complaints, indicating that personnel at SSC were unresponsive to her requests and that she suffered continual delays in obtaining information from SSC.[16] The unresponsiveness of the SSC hindered the job performance of Ms. Waldon and her staff. (Tr. 117-118). Ms. Waldon requested refunds and calculations that were not completed by SSC. She believed this was related to her complaints. She testified that requests from her and her staff would "go to the bottom of the pile."[17] (Tr. 120). Ms. Waldon began to believe the transaction turnaround time for the Central Division differed from other divisions because her Division's turnaround time averaged four to six weeks[18] while Mr. McLennan maintained turnaround was 24 hours and Ms. Beatty reported it was between two to three days. (Tr. 121).

On cross-examination, Ms. Waldon acknowledged that the refund process required certain paperwork to be submitted to Special Projects for review and preparation of the refund. The necessary paperwork was generated from either the customer, the

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[16] Ms. Waldon specifically named Ms. Beatty's "group," Ms. Smith, and Mr. McLennan as being uncooperative. The SSC is the same division/component of Stewart that was not "responsive" to Ms. Waldon's requests before she became DOA. However, Ms. Waldon testified that the recurring problems with SSC increased, without any specific quantification or frequency, because of her complaints. (Tr. 117-119).

[17] In deposition, Ms. Waldon identified her involvement in an investigation of a harassment complaint filed by Sharon Kirkpatrick as the only basis of Respondent's retaliation against her. (Tr. 193).

[18] Ms. Waldon implemented a tracking system in the Central Division for delivery and response times. (Tr. 120-121).

field, or from the Records Management Center (RMC). Consequently, Ms. Waldon admitted that refund delays could occur, and had occurred, when the paperwork was untimely forwarded to Special Projects due to delays in the field or the RMCs. (Tr. 207-209).

Mr. Crane gave Ms. Waldon permission to apply for the CFO position after Ms. Kirkpatrick left Stewart in September 2003.[19] During her interview, Mr. Crane informed Ms. Waldon that she was not eligible for the CFO position because she had not been in her current position for six months. She was told that she was an asset to the company and that her job would not be affected by Ms. Kirkpatrick's leaving. On October 28, 2003, Mr. Crane telephoned Ms. Waldon to tell her that Ms. Schumacher had been selected as the new CFO and Ms. Waldon's position was "secure." On October 30, 2003, Mr. Crane again told Ms. Waldon that her position was secure. (Tr. 123-125).

Ms. Waldon was aware that the company's financial position had declined in the three to four years prior to the Reduction In Force (RIF). In the summer and fall of 2003, Bill Rowe indicated that some locations would be closed and positions would be eliminated to cut costs. Mr. Crane informed Ms. Waldon that the Central Division would be restructured and that the three Records Management Centers (RMCs) would be consolidated into two.[20] He did not tell her about a reduction in force, but he did ask for her suggestions on the reorganization. (Tr. 195-196).

On October 31, 2003, a Friday, Ms. Waldon met with Mr. Crane and Ms. Schumacher. Ms. Waldon learned that Funeral Security Plans would be relocated at the SSC in New Orleans and that the Kansas City office "would be completely shut down and the work from it would temporarily be taken over by the Dallas office." Ms. Waldon questioned Mr. Crane about her job security and was referred to Ms. Schumacher for further discussion. (Tr.

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[19] In October 2003, Ms. Waldon asked Mr. Crane for permission to apply for the CFO position. Because she had not been in her position for six months, company policy required her to receive permission from her current manager and the hiring manager before applying. Mr. Crane was both her current manager and the hiring manager. He gave Ms. Waldon permission to apply for the position, but explained that it was "only a courtesy interview." (Tr. 172-173).

[20] The (RMC) is a regional office that handles all regional paperwork, receives all of the contracts, and performs quality control on the contracts before submission to SSC for processing. In early October 2003, Mr. Crane asked for Ms. Waldon's analysis and suggestions on consolidating the three RMCs in the Central Division into two RMCs. (Tr. 122).

126). Ms. Schumacher indicated that her position would be eliminated in the future.[21] (Tr. 127, 198). However, Ms. Waldon was informed she was needed to "transition the Funeral Security Plans" Ms. Schumacher gave her the option of having her position eliminated during "phase one," or staying through the "transition period." (Tr. 127, 198). Ms. Schumacher offered her the position of a trainer in the Midwest earning between $38,000.00 and $50,000.00 per year.[22] (Tr. 127, 198-199). At the time, Ms. Waldon was earning $75,000.00 per year, plus a ten percent bonus. (Tr. 127).

According to Ms. Waldon, Ms. Schumacher gave her a week to think about her decision, but began pressuring her for an answer as early as Monday of the following week. On Tuesday, Ms. Schumacher again inquired of her decision. Ms. Waldon indicated that she would be interested in a position in the Southern Region, as she had already relocated to New Orleans. Ms. Schumacher informed her that the position in the Southern Region had already been filled by Marsha Morse, an employee who worked for Ms. Waldon.[23] On Wednesday, Ms. Schumacher again inquired if Ms. Waldon was going to take the trainer position to which she responded "no." (Tr. 128-129).

Ms. Waldon declined the offer of the trainer position primarily because she believed there was no future with the company unless her position was based in New Orleans. (Tr. 199). She began discussions with Ms. Schumacher about the time required to "transition the duties and the Funeral Security Plans and get the conversion completed." Ms. Waldon wanted a "deadline" to "know exactly when [her] job would end." (Tr. 131-132). She felt she had three options: (1) stay in New Orleans and have the company pay for her expenses; (2) work from the Kansas City office and have the company pay for the termination of her apartment lease in New Orleans; or (3) turn in her notice. (Tr. 132, 200-201). Ms. Waldon did not threaten

[21] Janice Welsh was the DOA for the Eastern Division and reported to Kevin Tullier, the CFO of the Eastern Division. To Ms. Waldon's knowledge, Ms. Welsh's job was not eliminated and she was the only DOA who worked for a CFO to be reduced in force. (Tr. 136).
[22] At the time of the offer, the position as a "trainer" did not exist. (Tr. 130-131). Ms. Waldon did not believe she would be involved in the "financials" of the company if she took the "trainer" position; her job would no longer concern the issues regarding payoffs, refunds, and SAB-101 compliance. (Tr. 136-137).
[23] Although Ms. Morse worked for Ms. Waldon, Ms. Morse had previously held Ms. Waldon's position. Ms. Morse had been demoted at sometime in the previous year and a half. (Tr. 129). Unlike Ms. Waldon, Ms. Morse does not have a degree, nor is she a certified public accountant. (Tr. 130).

Ms. Schumacher, nor did she threaten to quit if her demands were not met. (Tr. 132). She stated that if Respondent did not agree to the first or second option, she would have no option but to turn in her two weeks notice. Ms. Schumacher responded that she would meet with Mike Crane to work on an agreement. (Tr. 201).

Ms. Waldon made her final decision during the week of November 7, 2003. On November 7, 2003, Ms. Waldon returned to Kansas City for the remainder of her employment with Stewart. She asked Ms. Allen to drive her to the airport. She informed Ms. Allen that she was leaving the company because her position had been eliminated and that she would remain in Kansas City for the duration of her employment. Ms. Waldon did not tell Ms. Allen that there was to be a "reduction in force" (RIF). (Tr. 134-135).

On November 25, 2003, Ms. Waldon received the "first version" of the "separation agreement" which did not contain a line for her signature. (Tr. 202, 205; RX-26). On December 1, 2003, Ms. Waldon asked Ms. Schumacher to make revisions to the first draft of the proposed separation agreement. On December 5, 2003, Ms. Waldon spoke with Ms. Schumacher about a revised version of the agreement. Ms. Schumacher stated that she was not going to discuss the agreement and that Ms. Waldon could either sign it or "do whatever." Ms. Waldon was told that she would "be asked to leave" if she brought up the agreement again. (Tr. 140-141). After December 29, 2003, Ms. Schumacher refused to discuss the separation agreement because Ms. Waldon had obtained counsel. (Tr. 224-225).

According to Ms. Waldon, she did not sign the last written agreement that was forwarded to her, nor did she execute a separation agreement and general release. (Tr. 132-133). Ms. Waldon did not believe she had reached an agreement with the company. Nevertheless, Stewart paid for the cancellation of her apartment lease in New Orleans, paid her 2003 bonus, and paid for the expenses of her one business trip to New Orleans, which were all items Ms. Waldon requested in connection with a resignation agreement.[24] (Tr. 203-204). Ms. Schumacher told Ms. Waldon she had been placed on the RIF list.[25] (Tr. 202). Ms. Waldon also worked through the "agreed upon" deadline. She

[24] Ms. Waldon clarified that she had earned her 2003 bonus as of October 31, 2003. She believed that the payment of her bonus is therefore "irrelevant" as to the requested "terms" of her departure. (Tr. 203).
[25] Ms. Waldon's "Human Resources Action Form" indicates that the "Reason for Termination" was a reduction in force. (CX-80; RX-55, p. 58).

received the same benefits as the RIF employees, but did not receive a letter about her COBRA benefits. (Tr. 204-205).

As a manager at the time of the reduction in force, Ms. Waldon had to deliver the message to her employees who were terminated. During her meetings with the employees, Ms. Waldon referred to the Manager's Resource Guide. (Tr. 214-215; RX-8). She met with the affected employees as a group before she met with them individually. Ms. Waldon estimated that 12 to 14 employees at her Kansas City facility were affected by the reduction in force and that approximately one-half of her staff, or 20 employees, were affected by the reduction. (Tr. 216-219). She was further aware that several other employees took pay cuts as a result of the reduction in force and that "higher ups in the company" may have been eliminated as well. She confirmed that she understood Respondent's financial position has improved since the RIF. (Tr. 213-214).

Ms. Waldon's last day of employment was January 31, 2004, and she was paid through February 28, 2004. (Tr. 144). In January 2004, Ms. Waldon was provided with a list of 150 jobs available with Stewart. No one explained why 150 vacancies existed after 300 positions were terminated. Ms. Waldon was not offered a job with Stewart that paid the equivalent of her prior earnings. (Tr. 143). Ms. Waldon did not apply for the open positions because she was only qualified for an accountant position in the Western Division. She did not want to relocate and was concerned about continued job stability with such a position in the company. The positions related to FSP were not posted until after she filed her Sarbanes-Oxley Complaint. (Tr. 146).

In her efforts to obtain another job, Ms. Waldon "contacted recruiters and went through the newspaper, responded to ads in the newspaper, posted [her] resume online, responded to online job postings." (Tr. 143-144). She was unemployed for a total of two and a half months. She began employment with Alex R. Masson on May 19, 2004, earning a salary of $66,000.00 per year. The position with Alex R. Masson does not include the same benefits she received at Stewart, namely long and short term disability, sick leave, four weeks of vacation, "401-K, flexible spending," and accidental death and dismemberment and life insurance. (Tr. 144-145, 149). With Alex R. Masson, she receives her salary, plus profit sharing if the company earns a profit. She can enter the 401-K plan after a year and a half. (Tr. 146).

Ms. Waldon testified that her termination experience was "very traumatic." She has sleeping problems, has become "extremely irritable" and had trouble dealing with her family. She believes she was fired because she was a whistleblower due to her complaints regarding the following: (1) the company's overstatement of revenues; (2) the company's inability to correctly calculate interest charges and the effects that would have; and (3) the manner in which the company was recording the cost of merchandise. (Tr. 146-147).

Stewart's inability to correctly calculate interest would affect the shareholders and give the wrong impression of the company's current financial position because it "overstates" the revenue by recognizing revenue that was not actually earned. Ms. Waldon opined that public awareness of the interest problem would have an impact on the company's credibility and would also have a "significant impact on the number of people who would be willing to purchase pre-need and secure the market share with Stewart Enterprises." (Tr. 147-148). She further stated that Stewart's failure to timely refund money under state law would affect shareholders because Stewart must "have the pre-need sales to secure future market." Additionally, Ms. Waldon suggested that failure to comply with SAB-101 would affect shareholders because it "understates the cost and again, gives an unrealistic view of what their financial performance was." (Tr. 148-149). According to Ms. Waldon, the incorrect calculation of interest could also present a problem with "Truth in Lending." (Tr. 149).

In March 2003, Ms. Waldon participated in a telephone conference with Kathy Lamkin in connection with a harassment and discrimination investigation. Ms. Waldon believed that Mr. Crane began acts of retaliation against her as a result of her participation in the investigation, namely denying her an office and monitoring her expense reports and itinerary. (Tr. 206).

During her deposition, Ms. Waldon stated that she was retaliated against because Mr. Crane "treated [her] differently with respect to [her] expense reports." (Tr. 190; RX-55, p. 215). At her deposition, Ms. Waldon further specifically related this retaliation to her involvement in a sexual harassment investigation and her indication that she had been sexually harassed by Mr. Crane. (Tr. 191; RX- 55, p. 215). At hearing, Ms. Waldon indicated that her deposition answer was incomplete. (Tr. 190-192).

Ms. Waldon kept a written diary to "protect" herself when she felt that "something odd" was happening. (Tr. 225-226; RX-56). The diary dated from May 12, 2003 through July 21, 2003, with an additional paper dated January 14, 2004. Ms. Waldon testified that the diary was related to the events involving Mr. Crane which stemmed from her conversation with Ms. Lamkin, rather than the events involving SSC. It does not contain entries regarding alleged retaliatory acts because of error rates, stonewalling, or her inclusion in the reduction in force. However, on May 26, 2003, Ms. Waldon noted that Mr. McLennan did not want a conversation to be "seen as negative, just because he was discussing issues that weren't working right." Ms. Waldon assumed this entry reflected a discussion of some problems. (Tr. 226-227). At her deposition, she failed to indicate that her diary was limited to occurrences in relation to her situation at the RMC, specifically relating to her claim that Mr. Crane sexually harassed her. She placed such a qualifier on her diary entries at the time of hearing. (Tr. 227-228; RX-55, p. 214).

Dana Breaux

Ms. Breaux is a complainant in the present case who was deposed by the parties and testified at formal hearing. (RX-54). She graduated from the University of New Orleans with a Bachelor of Science Degree in Finance. Although she is not a Certified Public Accountant, she took accounting courses while at the University of New Orleans and her employment has been related to accounting since her graduation. (Tr. 245, 302). Prior to her employment with Stewart, Ms. Breaux was employed for approximately 10 years in the banking industry, working for Whitney National Bank and First Commerce Corporation. She was Assistant Vice President at First Commerce Corporation. (Tr. 245-246).

In November 1998, Ms. Breaux was hired by Mr. McLennan as a quality assurance representative (QA representative) in the Eastern Division. (Tr. 246, 302). As quality assurance representative, Ms. Breaux acted as a liaison between funeral homes and cemeteries and the SSC, conducted training, and made recommendations for improvements. (Tr. 247). During her five years of employment with Stewart, she worked with Ms. Allen more than any other QA representative. Ms. Breaux reported to Mr. McLennan for approximately three years before she began reporting to Ms. Lenora Smith. Both Mr. McLennan and Ms. Smith gave her good evaluations and pay raises. (Tr. 304-305).

Ms. Breaux became aware of an interest calculation problem approximately three months after she began working for Stewart in 1998. (Tr. 315). She and Ms. Allen continuously complained to Mr. McLennan about refund problems, apparently commencing in 2000. (Tr. 250). In addition, Ms. Breaux and Ms. Allen identified "thousands of accounts" with disputed balances. (Tr. 248-249). Ms. Smith was the team leader responsible for clearing the disputed accounts. More specifically, Ms. Beatty was the group leader within Ms. Smith's team who was responsible for resolving the disputes. (Tr. 250). Special Projects became heavily backlogged with disputed accounts that were waiting for adjustments.[26] (Tr. 249). When she complained about Ms. Beatty and the backlogged accounts, Ms. Breaux felt that Ms. Smith personalized the matter by defending Ms. Beatty as "an asset to the company." (Tr. 250-252). Ms. Smith and Ms. Beatty began treating Ms. Breaux and Ms. Allen "rudely," no longer extending common courtesies and acting to "block" Ms. Breaux's performance.[27] (Tr. 253).

In May 2002, Ms. Breaux received a copy of her bonus plan for fiscal year 2002. (Tr. 312; RX-38). The first item on the bonus plan listed "Work with IS to fix the payment application program."[28] The first performance item did not apply to Ms. Breaux's bonus plan. However, as of May 2002, Ms. Breaux knew the company was aware of the payment application problem and was working to remedy it. (Tr. 312-313). The bonus plan would have been distributed to approximately thirty employees who were "bonused" within the SSC. (Tr. 315).

In November 2002, Ms. Breaux began reporting to Kevin Tullier, the CFO of the Eastern Division. Her job title became "quality assurance representative and director of administrative training." Approximately 50-60 percent of her work time was devoted to training. Ms. Breaux continued to complain to Mr. Tullier about the refund backlog. Mr. Tullier indicated he would discuss the issue with the other CFOs. (Tr. 254-255).

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[26] Special Projects resolved accounts where the customer pre-paid and a payoff issue arose. Special Projects performed analyses of the accounts and made necessary back end adjustments. (Tr. 316-317).

[27] On an unspecified date, Ms. Breaux complained about the "backlog of disputes," at which time her group was removed from any function regarding the disputes. Further, her group reported issues with certain reports and consequently was "taken out of the loop of distribution of those reports." (Tr. 377).

[28] The payment application program applied payments and computed the interest. (Tr. 313).

Ms. Breaux received a copy of the company handbook, as well as a copy of the Code of Business Conduct. She was familiar with the provision that required her to report any violations of law or ethics or company policy to her supervisor. If she was not satisfied with the manner in which her supervisor handled the complaint, Ms. Breaux was aware that she should report the violation to a higher official. (Tr. 308-310). Ms. Breaux complained to Mr. Tullier, the CFO of the Eastern Division. She also complained to Ms. Schumacher, who was the director of internal audit at the time. She believed Ms. Schumacher was a higher official than Mr. Tullier because internal audit reported directly to the Board. (Tr. 310-311).

Ms. Breaux testified at the hearing that she discussed violations of "Truth in Lending" at a meeting in early 2003. She was unsure if violations of "Truth in Lending" are violations of "law." During her deposition, Ms. Breaux testified that she believed Stewart's handling of amortizations and payoffs violated "a law," but did not report to anyone that she believed the company was in violation of any laws. (Tr. 323-324; RX-54, p. 110). In her deposition, Ms. Breaux further stated that she believed the violation occurred because Stewart took too long to fix the amortization problem and ignored their "responsibility to get it fixed quicker than they did." (Tr. 325; RX-54, pp. 110-111).

Stewart made customer refunds for many reasons, including instances when the interest calculation problem resulted in incorrect payoffs. Ms. Breaux was not personally aware of situations where customers were actually misquoted a lower amount than was actually owed, but conceded that such a situation could occur. In such an instance, the company could not ask the customer for more money and would have to write off the difference. (Tr. 327-328). Additionally, there were instances where Stewart would write off accounts because it could not determine whether the customer still owed money to the company. (Tr. 333). Ms. Breaux was not aware of any situation where a customer was overcharged and not refunded. Nonetheless, she believed Stewart would have to "restate" their revenue and financial records to reflect the "timing" of the payment. (Tr. 326).

Ms. Breaux received an e-mail from Mr. McLennan dated January 15, 2003, in which he addressed the problems with the AS/400 computer. (Tr. 255, CX-51). Based on the e-mail, Ms. Breaux believed a "fix" for the interest calculations had been implemented. Subsequently, Angie Apolinar, the Western Division

RMC director, informed Ms. Breaux that a manual re-amortization of an account resulted in a significantly higher refund amount than the amount originally submitted.[29] Ms. Apolinar reported the discrepancy to Ms. Beatty who explained that the company was aware of the calculation problem and that the problem was "hush-hush." (Tr. 256-257). Ms. Breaux was aware the company was working on a solution to the interest calculation problem, but became concerned that the company was "covering up the problem" after speaking with Ms. Apolinar. (Tr. 257, 319). Although she previously had not thought the interest calculation problem was a secret, the conversation with Ms. Apolinar caused her to infer that the company delayed a solution because it wanted the issue to be "secret." (Tr. 319-320). However, Ms. Breaux was also aware that the "testing phase" revealed more problems in the system which delayed the implementation of a "fix." (Tr. 330-331). Nonetheless, Ms. Breaux testified that she believed the problems continued for an "unreasonable" amount of time without the company devising an alternative plan. (Tr. 323).

Ms. Breaux and Ms. Allen decided to bring the incident involving Ms. Apolinar to the attention of Ms. Kirkpatrick.[30] Ms. Kirkpatrick was "shocked and angry" because she had been told the interest problem had been fixed. Ms. Kirkpatrick indicated that she would discuss the problem with Mr. Tullier, Ms. Breaux's supervisor, and look into it further. (Tr. 257-258).

On April 28, 2003, Ms. Breaux met with Ms. Schumacher.[31] Ms. Schumacher told Ms. Breaux she was being questioned as part of an investigation, but did not tell her what the investigation regarded. The meeting was confidential, but Ms. Breaux was not told that it was subject to an attorney/client privilege. (Tr. 258-259). Ms. Breaux acknowledged that Ms. Schumacher did not threaten her and was not rude to her during the meeting. (Tr. 327).

During the meeting, Ms. Breaux complained to Ms. Schumacher about her concerns with "refunds and interest and just general problems that [she] found within the management of the Shared Services Center." (Tr. 260). Ms. Breaux informed Ms.

[29] Ms. Apolinar re-amortized a refund request of $76.00 and discovered Special Projects had quoted the customer a refund close to $1,000.00. (Tr. 256-257, 316).
[30] Ms. Kirkpatrick was the CFO of the Central Division and supervised Ms. Allen. (Tr. 257).
[31] Ms. Schumacher was the head of internal audit. Ms. Breaux believed Ms. Schumacher reported directly to the Board and to Mr. Budde. (Tr. 258-260).

Schumacher some practices within the SSC created "accounting nightmares" and that she felt retaliated against because of tension in the building and being excluded from e-mails and meetings. (Tr. 261). Ms. Schumacher's notes of the meeting reflect a discussion of "tension and the attitudes" within the office, which were attributed only to the Lenihan lawsuit at the time.[32] (Tr. 344; CX-27). Ms. Schumacher's notes reflect a discussion of the interest amortization problem in connection with Ms. Breaux's conversation with Ms. Apolinar. Ms. Breaux also indicated that refunds took longer than normal and that she had discussions with the CFOs regarding the field's increased frustrations with the SSC. (Tr. 345-346). Due to existing tensions within the office, Ms. Breaux asked that her name not be associated with the complaints in hope of avoiding retaliation. (Tr. 262, 347).

Ms. Breaux informed Mr. Tullier that she met with Ms. Schumacher and he suggested she speak with Peggy Fowler, the head of the Eastern Division Human Resource group. Ms. Breaux told Ms. Fowler that she was experiencing retaliation, but did not testify to any specifics of her statements to Ms. Fowler. She further indicated that she met with Ms. Schumacher. Although Ms. Fowler stated that she would document their conversation in Ms. Breaux's employee file, the file did not contain any documentation of their meeting. (Tr. 262-264).

At formal hearing, Ms. Breaux testified that she attributed the hostile work environment to the Lenihan lawsuit, but felt increased hostility as she tried to resolve the other work-related issues. (Tr. 348). She explained that she met "resistance" in getting the issues resolved and felt that "the more we complained, it just continued to build a wall between quality assurance and [Mr. McLennan] and [Ms. Smith] and [Ms. Beatty]." (Tr. 340-341). She testified that the hostile work environment existed before her meeting with Ms. Schumacher on April 28, 2003. The hostile work environment was directed at Ms. Breaux, Ms. Allen, and Mr. DoCampo, all quality assurance representatives. (Tr. 338). Ms. Breaux had problems getting answers addressed on refunds and disputed accounts before she began complaining about calculations and refunds. (Tr. 342).

[32] Ms. Breaux is a friend of Catherine Lenihan, an employee who brought a discrimination suit against Stewart Enterprises. (Tr. 303). Ms. Breaux felt "immediate friction" when Ms. Lenihan's lawsuit was filed and often felt as if she had to choose sides. (Tr. 340-341). Counsel for Respondent suggested the Lenihan lawsuit was filed in 2000, but Ms. Breaux testified that she could not recall the date of filing. (Tr. 341).

However, she believed the work environment worsened after she raised concerns about the "hush-hush" comment. (Tr. 342-343).

Ms. Breaux testified that "retaliation" continued after her meeting with Ms. Fowler. Ms. Breaux was excluded from meetings and e-mails. Upon her request, Mr. Tullier allowed Ms. Breaux to work from home for three days due to the stressful office environment. According to Ms. Breaux, Mr. Tullier indicated that the CFOs were aware of the "hostile work environment." (Tr. 264). Ms. Breaux testified that she told Ms. Schumacher of an "us versus them" environment between the SSC and the field, which involved "a lot of finger pointing" and blame shifting. (Tr. 339). Ms. Breaux also informed Mr. Tullier that the Special Projects staff had been instructed not to speak with the QA representatives. Mr. Tullier advised against expressing these concerns to Mr. Budde or Mr. Rowe. (Tr. 291-292).

On May 20, 2003, Ms. Breaux sent an e-mail to the RMC directors, which she copied to the CFOs and QA representatives. (Tr. 266; CX-92). The e-mail outlined an agenda for a quality assurance conference to be held in Dallas, Texas, in June 2003.[33] Ms. Breaux informed the CFOs that the SSC was not involved with the conference because the RMC directors and others expressed fears of retaliation. (Tr. 266-268).

Several hours of the conference were devoted to discussions of refund requests, payoffs, rewrites, trade-ins, and goodwill credits. The purpose of the discussion was to allow the RMC directors to openly address their issues with those "functions."[34] (Tr. 268). In an e-mail dated June 30, 2003, "parking lot issues" were assigned to various people who were instructed to follow-up on the issue and share a resolution with the "group."[35] (Tr. 271; CX-53). The CFOs were to handle any issues involving the SSC due to the hostility between the SSC and the QA representatives. (Tr. 272).

A "pending other source" (POS) is a payment that is expected to be received from someone other than the customer.

[33] Approximately eighteen employees were contacted by e-mail and attended the three day conference in Dallas, Texas. The conference was not a secret and was sponsored by the company. (Tr. 321-322).

[34] At the time of the conference, Pedro DoCampo and Mike Koester were also QA representatives. However, only Ms. Breaux and Ms. Allen actually "conducted" the conference because Mr. DoCampo and Mr. Koester were "not involved in the issues, or understood the issues to the degree that [Ms. Breaux and Ms. Allen] did." (Tr. 272-273).

[35] Ms. Breaux and Ms. Allen collaborated in the preparation of the e-mail documents contained in CX-52, CX-53, and CX-92.

In the summer and fall of 2003, when a contract was pending other sources, the contract "was given 90 days to pay" and the customer would receive a statement showing that he did not owe anything. (Tr. 274). According to Ms. Breaux, the AS/400 could not properly account for a situation in which the third party did not pay. Ms. Breaux testified that "Special Projects was deleting the pending other sources data out of those fields. And because of that, statements were being generated that showed a zero balance to the customer, which indicated to the customer that the account was paid." (Tr. 274). The system made it difficult for Stewart to then collect the unpaid money from the customer because the customer had a statement indicating the balance already had been paid in full. (Tr. 275). Ms. Breaux testified that the POS problem interfered with Stewart's ability to collect true balances on the accounts, it inflated receivables, and it affected the shareholders' financial statements. (Tr. 280-281; 376-377).

Ms. Breaux informed Mr. McLennan of her concerns with the POS system and was referred to Ms. Beatty. Ms. Breaux was told that she was incorrect and misunderstood the system. After discussing the matter with the CFOs, Ms. Breaux and Ms. Allen were given permission to continue looking into the matter. (Tr. 276).

Ms. Breaux met with Lori Coleman, an information systems (IS) programmer. Ms. Breaux, Ms. Allen, and Ms. Coleman developed a solution to the POS problem and subsequently met with Ms. Beatty. In November 2003, Ms. Breaux met with the CFOs regarding the POS problem and solution. (Tr. 278). Although Ms. Breaux, Ms. Allen, and Ms. Coleman developed a solution to the POS problem, the "fix" had not been implemented at the time Ms. Breaux was terminated. (Tr. 337).

On cross-examination, Ms. Breaux testified that the customer is ultimately responsible for his bill. Ms. Breaux was concerned with the system because Stewart had not implemented a means to notify the customer that he was responsible for his balance after the third party refused to pay. (Tr. 334-335). Ms. Breaux did not know if the POS system violated any law. (Tr. 335).

Ms. Breaux's workstation was moved four times in her five years of employment with Stewart, but she believes only the last move was retaliatory. (Tr. 348). In November 2003, all of the QA representatives were moved with less than one day notice. (Tr. 264). She testified that "they didn't know where they were going to relocate us. We had to find our own relocation spot, pack our stuff, move our own belongings which we had not had to do in the past." Ultimately, Ms. Breaux was relocated to "a less than adequate workspace." (Tr. 264). Ms. Breaux found the lighting in her new location to be inadequate, but she did not request additional lighting nor did she bring her own lighting. (Tr. 348-349). She was located next to a poorly lit storage area. A partition behind her desk blocked the natural light coming from a window behind her. (Tr. 351-352). In addition, the cubicles were not standard-sized, and the equipment did not properly function. (Tr. 247-248). Ms. Breaux testified it was clear the location was temporary and her position was terminated one month after the move. (Tr. 353-354). At the time, the entire SSC was being reconfigured and restructured and many people were moved to new workspaces. (Tr. 355). Mr. DoCampo, who did not express concerns about interest calculations and refunds, had a smaller work area than Ms. Breaux and Ms. Allen. (Tr. 358-359).

On December 3, 2003, Ms. Breaux, Ms. Allen, and Mr. DoCampo met as a group with Ms. Schumacher and Phil Sprick, the head of Human Resources. During the meeting, the QA representatives were told that their positions were affected by the RIF.[36] Ms. Breaux did not meet with Mr. Tullier, who was located in McLean, Virginia, in connection with her termination.[37] Although Mr. Tullier was her manager, the "Manager's Termination Checklist for Structuring Process" contained the signature of Mr. Sprick on the line identified as "Name of Manager Completing the Form." (Tr. 295-296; CX-12). Later that day, Ms. Breaux participated in another meeting with Mr. Sprick while Mr. Tullier was on the telephone. (Tr. 297, 364). Mr. Sprick explained her severance package and benefits, that she was eligible for re-hire, and encouraged her to post for any open positions. (Tr. 365). During the meeting, Mr. Sprick allowed Ms. Breaux to speak "one-on-one" with Mr. Tullier. Mr. Tullier informed Ms. Breaux that her termination was not a reflection of her work performance, that she had done an outstanding job, and encouraged her to post for other positions with the company. Ms. Breaux informed him

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[36] Prior to December 3, 2003, Ms. Breaux was aware the company was planning a "head count reduction," as she attended the "state of the company address" by Mr. Rowe. (Tr. 362).

[37] At the time of her termination, Ms. Breaux's office was located in Metairie, Louisiana. Mr. DoCampo and Ms. Allen were also located in Metairie, however, Mr. Koester's office was located in the Western Division in California. (Tr. 306-307). Ms. Schumacher was the only divisional CFO who had an office in New Orleans at the time of Ms. Breaux's termination. (Tr. 307-308).

that she had no desire to work for the company. (Tr. 297). Ms. Breaux never called the job line to inquire about available job openings. (Tr. 365-366). She testified that she assumed her inclusion in the RIF stemmed from her complaints, dating back to 2000, because she was never given any other explanation. (Tr. 365-367).

Ms. Breaux believed the shareholders were affected by the company's inability to correctly calculate interest. She believed the incorrect calculations resulted in an overstatement of revenue. She also believed the untimely payment of refunds exposed the company to potential litigation. Ms. Breaux discussed compliance with "Truth in Lending" during a meeting with the CFOs in late 2002 or early 2003. (Tr. 298-299). The POS problem presented collection issues that affected revenue. (Tr. 299-300).

At the time of her termination, Ms. Breaux was earning $52,000.00 per year with a bonus of $5,000.00 per year. She also received vacation, medical benefits, dental benefits, sick and personal time, and 401-K, along with accidental death, disability, and life insurance. She could not afford COBRA, and has no hospitalization insurance presently. (Tr. 300). Since her termination, Ms. Breaux has registered with two head hunters and posted her resume on "Career Builders" and "Monster.com." She searches the internet and newspaper for positions on a weekly basis. She has been on five interviews, but has not been offered a job. She earned $300.00 for "project consulting type work." (Tr. 301).

Ms. Breaux described herself as "extremely depressed." She testified that she suffers from insomnia and has little patience with her child as a result of the stress from losing her job with Respondent. (Tr. 301).

Patricia Allen

Ms. Allen, a complainant in the present case, testified at formal hearing and was deposed by the parties on July 23, 2004. (RX-53). She has a Bachelor of Science degree in Accounting and a minor in Business Administration. She is not a Certified Public Accountant. Before her employment with Stewart, she worked at First National Bank of Commerce for approximately six to seven years as a bank auditor and then as manager of the "bank card center." (Tr. 386).

Ms. Allen began working for Stewart Enterprises as a temporary accountant in 1994. After one year, she was offered a full-time position with the accounts receivable department in the Central Division. Ms. Allen became a member of the SSC one year later. In the SSC, she held the position of "group leader and contract processing" and worked for Leslie Bellwear, a team leader for contract processing. Ms. Bellwear was replaced by Ms. Lenora Smith. Ms. Allen and Ms. Smith maintained a "great relationship." (Tr. 387-388).

In March 2001, Ms. Allen took a position as a QA representative for the Central Division under the supervision of Mr. McLennan. Shortly thereafter, Ms. Smith again became Ms. Allen's supervisor. (Tr. 389). Although she was assigned to the Central Division, Ms. Allen worked closely with Ms. Breaux, the QA representative for the Eastern Division. (Tr. 390).

As a QA representative, Ms. Allen dealt with disputed accounts and handled "hundreds, thousands of disputes" on a monthly basis. Ms. Allen testified the disputed accounts were "held up" in Special Projects. The QA representatives were consistently told that Special Projects was not provided the proper documentation to process the disputes.[38] Ms. Allen found that Special Projects was not receptive to her suggestions. She began to feel resentment from Ms. Smith and Ms. Beatty after making complaints about the dispute resolution process, at an unspecified time/date.[39] (Tr. 391-393).

In late 2002, Ms. Allen began reporting to Ms. Kirkpatrick, the CFO of the Central Division. Her job title became "QA representative and director of administrative training for all divisions" and she was no longer part of the SSC. (Tr. 393-394). Before working under Ms. Kirkpatrick, Ms. Allen worked on a project in the Central Division that related specifically to disputes and refunds. Ms. Allen spent six weeks in Texas identifying disputed accounts. She brought necessary documentation to Special Projects to have the disputes cleared. After several months passed, the disputes were not resolved and Ms. Allen was told that Special Projects was lacking the necessary documentation. Ms. Allen complained to Ms. Smith, Ms. Kirkpatrick, and Mr. McLennan. Ms. Allen reported her concerns about refunds to Ms. Kirkpatrick. (Tr. 395).

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[38] Ms. Allen testified that Special Projects blamed the untimely refunds on a lack of proper documentation, even when she submitted the necessary documents. However, she did not believe Special Projects was delaying refunds in an attempt to make her look bad. (Tr. 492-493).

[39] Ms. Allen testified that all QA representatives had problems with Ms. Smith because they felt her personal relationship with Ms. Beatty "overruled" their professional relationship. (Tr. 455-456).

Ms. Allen first became aware of an interest calculation problem in 2002. (Tr. 486). Upon receiving the January 15, 2003 e-mail from Mr. McLennan, Ms. Allen assumed interest calculation and payoff problems were remedied. (Tr. 397; CX-51). After learning of the conversations involving Ms. Apolinar, Ms. Allen realized the system had not been corrected. (Tr. 397). On cross-examination, Ms. Allen testified that the "new system" was not implemented because of "problems." Ms. Allen further testified that she did not believe the company intended to "short customers" and that the AS/400 computer system was causing inadvertent mistakes. (Tr. 491). Through her discussions with Ms. Beatty, Ms. Allen learned that refunds were recalculated by the Special Projects group when a customer or the field made a complaint. (Tr. 424-425). However, Ms. Allen was concerned with the accounts that received no complaints and consequently received no refund. (Tr. 511). Nonetheless, Ms. Allen was not aware of any customer who was overcharged and not refunded his money due to the "payment application problem." (Tr. 510). Further, she was not working in Special Projects and was not involved with the project to fix the AS/400. She does not know what internal controls were in place to manually address the problem. (Tr. 512).

On April 28, 2003, Ms. Allen met with Ms. Schumacher.[40] Ms. Allen was informed that her name had arisen several times in connection with an investigation being performed by Ms. Schumacher. Ms. Schumacher told her the meeting was confidential, but did not mention the applicability of an attorney/client privilege. (Tr. 397-398). Ms. Allen explained to Ms. Schumacher that she was having difficulty performing her job. (Tr. 399-400). Ms. Allen testified that she was "stonewalled" and could not get answers to questions after she began complaining about the SSC. According to Ms. Allen, when the SSC was implicated in a problem "it was like an inquisition. You had to give reasons why. And regardless of what you were saying, the Shared Services Center always had a reason why it was not their fault." (Tr. 400). She indicated to Ms. Schumacher that communication issues existed between the field and the SSC, which stemmed from an "us versus them" attitude. (Tr. 493-494). Ms. Allen reported her job performance was hindered and she found that personnel within the SSC had "unprofessional" attitudes. (Tr. 401).

[40] Ms. Schumacher kept notes of the meeting on April 28, 2003, which reflect the issues discussed. (CX-26).

Ms. Allen and Ms. Schumacher also discussed Ms. Waldon. In particular, Ms. Allen relayed a conversation between Ms. Waldon and Ms. Smith concerning e-mail replies that Ms. Waldon felt were unnecessarily long and not productive. Ms. Smith assured Ms. Waldon the problem would be addressed, but the e-mails continued in the same manner. (Tr. 401-402). Ms. Allen expressed her "concerns" to Mr. McLennan and Ms. Smith. (Tr. 401-402). Mr. McLennan referred Ms. Allen to Ms. Smith. Ms. Smith assured her the problem would be resolved, but it continued to occur. Mr. McLennan told Ms. Allen to stay out of the conflict. (Tr. 403).

Ms. Allen also informed Ms. Schumacher of Ms. Breaux's concern of retaliation through the error reports. Ms. Allen believed that both she and Ms. Waldon were subject to retaliation in the error reports, as well.[41] Ms. Allen testified that her bonus plan for the year was based on reducing errors for the division. (Tr. 403-404). Ms. Allen believed the error reports were correlated to the complaints being made because "it was all subject to interpretation on who was counting the errors." (Tr. 404). Contract Services under Ms. Smith's supervision was responsible for counting errors, but did not do so consistently. (Tr. 460). The Eastern and Southern divisions did not have increased error ratios in the same areas. (Tr. 405).

Ms. Allen and Ms. Schumacher also discussed "duplicate refunds." Ms. Allen complained that the system was not consistently calculating accurate interest on all contracts. She also reported that she was not copied on e-mails. (Tr. 407).

On April 30, 2003, Ms. Allen was called to a conference with Jim Incaprera, Dionne Schlorff, and Buddy Yuling.[42] Ms. Allen felt that Mr. Incaprera was trying to intimidate her during the meeting. (Tr. 410-411). The meeting continued for approximately one hour, during which Mr. Incaprera questioned her on the falsification of a refund request.[43] Ms. Allen

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[41] Ms. Allen received pay raises and good evaluations during the time she was a QA representative. She completed all required goals to receive her bonus for the fiscal year 2002, including a contract error rate of 3.5 percent. She also received her full bonus for fiscal year 2003. (Tr. 458-459).

[42] Ms. Schlorff was a representative from the Human Resources department and Mr. Yuling was a member of the "investigation team." At their meeting on April 28, 2003, Ms. Schumacher did not inform Ms. Allen that she was under investigation for falsifying documents. (Tr. 410).

[43] While working with Ms. Kirkpatrick, Ms. Allen's duties included reviewing refund requests for "reasonableness." She did not review the requests for

testified that she attempted to explain the situation, but her explanation was not accepted. Mr. Incaprera presented Ms. Allen with a statement concerning her actions involving the refund request. Ms. Allen testified that she signed the statement under duress, but did not admit that she falsified documents. (Tr. 415-419; CX-59).

A few days after the April 30, 2003 meeting, Ms. Allen was called to another meeting with Mr. Incaprera. Ms. Kirkpatrick and another investigator were present as well. Ms. Kirkpatrick explained that the refunds were done at her request and there was no evidence that Ms. Allen had altered the documents. (Tr. 420-421). Ms. Allen was asked to leave the meeting. Ms. Allen testified that Ms. Kirkpatrick left the meeting in tears. (Tr. 421). A few days later, Ms. Kirkpatrick and Ms. Schlorff asked her to sign a document indicating that she understood that altering documents violated company policy and another offense would result in her termination. Ms. Allen was put on "final notice." (Tr. 421-422; CX-57).

Ms. Allen felt the incident was an act of retaliation and intimidation by the investigation department. By the time the investigation occurred, Ms. Allen had already complained about the interest calculation issue and the untimeliness of refunds within the Central Division.[44] (Tr. 423-424). On cross-

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accuracy and sent the requests to Customer Service to verify the validity of the refunds. (Tr. 412). Mr. Incaprera showed Ms. Allen a refund request that contained her initials, as well as another set of initials and a stamp from accounts payable indicating the refund check was approved and "cut." (Tr. 411-413; CX-51). Mr. Incaprera produced a second copy of the refund request that did not contain Ms. Allen's signature or initials, nor did it contain the second set of initials or approvals by the accounts payable department. (Tr. 413-414; CX-56). Ms. Allen explained the customer returned the refund check in question and Mr. McLennan asked for a copy of the refund request by e-mail dated March 27, 2003, before she raised concerns about interest calculations and payoffs. (Tr. 497; RX-59). She requested a faxed copy of the request from Holly Rust, the manager of the RMC in Dallas, Texas. She would have forwarded the faxed copy to Special Projects. (Tr. 415-416). She testified that she would not likely have signed the second copy of the request because it was a "courtesy copy" sent to another department. (Tr. 416).

[44] The Central Division included both Texas and Missouri. Texas required the issuance of refunds within 30 days of the request. Missouri required the issuance of refunds within 10 to 15 days of the request. Ms. Allen testified that Stewart was not processing the refund requests within the time frames required by Texas and Missouri state laws. (Tr. 423-424). Ms. Allen has no knowledge of Stewart's license being revoked or Respondent being sanctioned in either Texas or Missouri due to untimely refunds. She is unaware of any lawsuits against Stewart based on untimely refunds. (Tr. 492).

examination, Ms. Allen testified that Mr. McLennan informed Ms. Kirkpatrick of the inconsistencies in the refund request under investigation. Ms. Kirkpatrick then informed internal audit of the situation and asked for an investigation. (Tr. 499). However, Ms. Allen did not believe Ms. Kirkpatrick retaliated against her by bringing the matter to internal audit. (Tr. 501).

Ms. Allen helped author the e-mail dated May 20, 2003, which addressed the agenda for the June 2003 conference in Dallas, Texas. (Tr. 427; CX-92). Ms. Allen and Ms. Breaux conducted and presented the conference. Mr. DoCampo and Mr. Koester did not participate in the presentation, but sat with the other conference participants. (Tr. 429-430). One issue at the conference involved the calculation of interest, specifically whether the RMCs and Special Projects used the same methods of interest calculation. (Tr. 488). Some conference participants obtained copies of the amortization schedule from Special Projects and found that the amortization results differed depending on the interpretation of the schedule. Other participants could not obtain a copy of the amortization schedule and continued to rely on the AS/400 screen. (Tr. 431).

Ms. Allen testified that the 18 people in attendance at the conference were aware of the interest problem, as were others who did not attend the conference. Although Ms. Schumacher did not tell Ms. Allen the interest problem was a secret, Ms. Allen believed it was "not to be discussed" after her meeting with Ms. Schumacher and their confidential discussions. (Tr. 488-489). An e-mail dated June 30, 2003, identified "sensitive" issues that dealt with the SSC. According to Ms. Allen, the QA representatives were to discuss the issues with the CFOs. The CFOs were then to address the issues with the SSC. (Tr. 432).

In August or September 2003, Ms. Allen attended a meeting where Mr. Rowe discussed changes within the company. He indicated the company would make structural changes, including a work force reduction.[45] On November 7, 2003, Ms. Allen drove Ms. Waldon to the airport. Ms. Waldon was upset and stated that her job was being eliminated. (Tr. 444). Although she stated in her deposition that Ms. Waldon told her confidentially of a RIF, Ms. Allen testified at hearing that Ms. Waldon never used the phrase "reduction in force." (Tr. 445, 502; RX-53, p. 228).

[45] Ms. Allen was aware the company had not performed well financially in the five years prior to the RIF and that the earnings have increased since the RIF. (Tr. 503-504).

According to Ms. Allen, the POS system posed a problem because customers received statements with a zero balance. If the customer was not aware that he owed a balance, the balance remained unpaid. Consequently, the company's "bad debt reserve" would increase and affect its revenue. (Tr. 442-443). On cross-examination, Ms. Allen agreed that Stewart attempts to collect its receivables through Customer Service or a third party collection entity. (Tr. 509-510). Ms. Allen, Ms. Breaux, and Ms. Coleman devised a solution to the POS problem, which they presented to Ms. Beatty. Subsequently, they presented the solution to the CFOs. Ms. Schumacher was present at the meeting and suggested that Frank Boynton "spearhead" the project. Ms. Allen did not know if the company ever implemented the "fix" developed by Ms. Breaux, Ms. Coleman, and herself. (Tr. 443).

Ms. Allen was not always included in e-mails or meetings. She did not get copies of changes in policies or procedures.[46] Her ability to perform her job was "drastically" inhibited. (Tr. 393). Ms. Allen testified that she felt "threatened" when Mr. McLennan was going to bring certain "issues" to the Senior Executives Committee. (Tr. 407-408). She explained that he had never brought her other complaints to the attention of the Senior Executives Committee. However, Ms. Allen agreed that she would want him to do so if that was the procedure necessary to resolve the issues. (Tr. 494-495). Mr. McLennan was always friendly with Ms. Allen, treated her professionally, and never had a confrontation with Ms. Allen. (Tr. 462).

Ms. Allen's workspace was moved several times during her employment with Stewart. The last move occurred on October 31, 2003. Ms. Allen and Mr. DoCampo complained about the move on that day.[47] Ms. Allen complained about a lack of overhead compartments for storage of journals and binders. In addition, she did not have a key to her desk for storage of personal items and the file cabinet drawers did not close. (Tr. 433). Ms. Allen testified that her new workspace provided approximately the same "desk area" as her previous workspace. (Tr. 436). Dennis Lafont's group was located in cubicles adjacent to Ms. Allen. Mr. Lafont's group had cubicles that were completely "finished out." Ms. Allen testified that her workspace appeared to be temporary. (Tr. 436-437).

Ms. Allen did not have "as much of a problem" with lighting as Ms. Breaux. The overhead cabinets that were not provided

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[46] Mr. DoCampo also did not receive certain e-mails, notice of meetings, or copies of policy and procedural changes. (Tr. 493).

[47] Ms. Breaux was not present to participate in the move. (Tr. 432).

would have included additional recessed lighting. Ms. Allen believed she was relocated in retaliation for her complaints. (Tr. 436, 441). On cross-examination, she testified that she was able to perform her job functions at the new work location, although it was more difficult. (Tr. 507). She testified that other employees within the SSC were relocated and that the corporate offices moved into the Shared Services building. (Tr. 508-509).

On December 3, 2003, Ms. Allen, Ms. Breaux, and Mr. DoCampo met as a group with Ms. Schumacher and Mr. Sprick. They were told their positions were being eliminated.[48] Ms. Allen then met with only Ms. Schumacher and Mr. Sprick. Mr. Sprick told her about the job postings. Ms. Allen did not understand why she was not offered another position if there were available jobs for which she could post/apply. Ms. Schumacher informed her that the company had posting procedures to follow. Ms. Allen testified that the posting procedures were not always followed in the past. Ms. Schumacher did not offer Ms. Allen a job nor did she tell Ms. Allen that there was an available job in "training." (Tr. 446-447). Ms. Allen was aware that she was eligible for outplacement services and knew she was eligible for rehire. (Tr. 505).

Ms. Allen received a copy of the available postings and was aware of the job posting hotline. However, she did not intend to post for a job with Stewart. She signed with headhunters, used Monster.com, and followed the want ads on a constant basis. Ms. Allen has been on three interviews. She was temporarily employed between March and June 2004, earning a total of approximately $4,000.00. (Tr. 448-450). In late August 2004, she found employment with Pepper Source, Inc., in Metairie, Louisiana. Ms. Allen earns $33,000.00 per year. She no longer receives the following benefits: medical insurance, life insurance, long term disability, and a 401-K. (Tr. 451). Ms. Allen earned $54,000.00 a year with Respondent and a $5,000.00 bonus.

Following her termination, Ms. Allen became "distant" and had difficulty with her family. She had difficulty sleeping, as well. She sought counseling with her parish priest. (Tr. 452).

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[48] Mr. DoCampo was included in the RIF though he did not report as many complaints as Ms. Allen and Ms. Breaux. (Tr. 505).

Ms. Allen does not know who made the decision to include her position in the RIF, but is aware that many valuable employees were terminated. (Tr. 507).

Ms. Allen testified that the inability to correctly calculate interest would result in an inflation of interest income and "an adjustment for the bottom line," which would impact shareholders. The failure to timely issue refunds exposes the company to potential lawsuits. The POS problem affected shareholders because the uncollectible accounts grow, the "bad debt" increases and "ultimately affects the bottom line and affects the profitability of the company." (Tr. 453-454). Ms. Allen believed she was doing her job by reporting these problems. She believes she suffered retaliation and termination as a result of her complaints. (Tr. 454).

On cross-examination, Ms. Allen acknowledged that in 1998, she was involved in two instances of personal credit card use in violation of the Code of Business Conduct. Ms. Allen believed the two instances had been resolved, but she received a "write up" for both instances in October 2002. The "write up" also included an incident of personal use of the company credit card in 2002. She stated the write-ups were in retaliation and intimidation for whistleblower activity raised or alleged in the instant case. (Tr. 471). Ms. Allen did not believe it was appropriate to issue a "write up" for incidents that occurred four years earlier. She also thought the 2002 incident had been resolved prior to receiving the "write up." (Tr. 471-481). Although Ms. Allen signed the document, she included a notation that she would be forwarding a "rebuttal." She testified that she sent the rebuttal to Kathy Lamkin in Human Resources. (Tr. 482).

Sharon Kirkpatrick

Ms. Kirkpatrick has a Bachelor's degree and is a Certified Public Accountant. She was the Chief Financial Officer for the Central Division while employed at Stewart, answering to Mr. Crane and Mr. Budde.[49] Among her direct reports were Ms. Waldon and Ms. Allen, who respectively held the positions of Director of Administration and QA representative. (Tr. 636-637).

Ms. Kirkpatrick received complaints from Ms. Allen regarding the timeliness of refunds. Ms. Allen and Ms. Breaux

[49] Mr. Crane was the president of the Central Division and Mr. Budde was the Chief Financial Officer of the company. (Tr. 637).

also informed Ms. Kirkpatrick of problems with interest calculations.[50] Ms. Kirkpatrick testified one of their main concerns was that the company was in violation of the Truth in Lending Laws, although she was uncertain if Ms. Allen actually used the phrase "Truth in Lending." (Tr. 640, 670). Ms. Allen and Ms. Breaux reported that Ms. Beatty instructed Ms. Apolinar that the interest calculation problem was considered "hush-hush." (Tr. 638-639). Ms. Kirkpatrick testified that she was surprised by the comment and she had not been aware of an interest calculation problem. (Tr. 639). When Ms. Kirkpatrick informed Ms. Schumacher of the interest calculation problem, she suggested Ms. Schumacher further discuss the issue with Ms. Allen and Ms. Breaux. Ms. Schumacher indicated the company was aware of the problem and was working to remedy it. (Tr. 668).

Prior to her meeting with Ms. Allen and Ms. Breaux, Ms. Kirkpatrick received the January 15, 2003 e-mail in which Mr. McLennan indicated the company was working on the payment application problem. At that time, Ms. Kirkpatrick thought Mr. McLennan was referring to inconsistencies in the system of which she already knew: ". . . it was my understanding that the payment screen didn't jive with the AR system, so you had to go outside the AR system to get the correct balance . . . it seemed like that's what they were working on getting the two in sync." (Tr. 669). She was not aware that the payoff screen was incorrect and that it did not show the correct balances for customers. From her meeting with Ms. Allen and Ms. Breaux, Ms. Kirkpatrick learned that Special Projects was manually recalculating the refunds as of March 2003 and that the manual calculations were causing a delay in the issuance of refunds. (Tr. 669-670).

Ms. Kirkpatrick met with Mr. Crane and Mr. McLennan regarding the timeliness of processing "certain things." Ms. Kirkpatrick presented a list of items assembled by Ms. Allen that were backlogged. Mr. McLennan maintained a "stock answer" that everything had a 24-hour turnaround time and appeared surprised to learn of the backlog. Ms. Kirkpatrick believed a 24-hour "turnaround" may have occurred in "isolated instances," but the majority of items took weeks. (Tr. 641). Ms.

[50] Ms. Breaux and Ms. Allen were concerned that Ms. Kirkpatrick would tell Ms. Schumacher that they were the source of the complaints. Ms. Kirkpatrick stated they were "afraid they were going to wind up in the middle of something." (Tr. 671).

Kirkpatrick informed Mr. McLennan that Ms. Allen prepared the information presented at their meeting.[51] (Tr. 641-642).

Shortly after meeting with Mr. Crane and Mr. McLennan, Ms. Kirkpatrick received a phone call from Ms. Allen. Ms. Allen asked if "there had been trouble at the meeting" and expressed concern at Ms. Beatty's reaction following the meeting.[52] That afternoon, Mr. Crane informed Ms. Kirkpatrick that Mr. McLennan was concerned about "an issue with some forged or bogus documents related to" Ms. Allen.[53] Ms. Kirkpatrick contacted Ms. Schumacher and asked her to investigate the matter as retaliation against Ms. Allen. Ms. Kirkpatrick testified that "the timing seemed convenient and it just seemed like he was trying to nail her."[54] (Tr. 642-643). Ms. Schumacher put Mr. Incaprera in charge of the investigation. (Tr. 643).

On cross-examination, Ms. Kirkpatrick agreed that, as CFO, she was concerned about a report that a document had been altered because it was a violation of the "code of misconduct." While, the timing of the investigation was her biggest concern, Ms. Kirkpatrick agreed that she wanted Ms. Schumacher to look into whether Ms. Allen had actually altered the document. (Tr. 656-657).

Ms. Kirkpatrick attended a meeting with Ms. Allen, Mr. Incaprera, another investigator, and Ms. Schlorff. When Mr. Incaprera tried to have Ms. Allen agree that she had circumvented procedures on a refund, Ms. Kirkpatrick asserted that his statements were "not exactly true." According to Ms. Kirkpatrick, Mr. Incaprera became angry with her after Ms. Allen was asked to leave the meeting. Ms. Kirkpatrick indicated that she simply had some questions and wanted clarification on the issues before terminating an employee. Mr. Incaprera indicated that he was not telling her to fire Ms. Allen. Ms. Kirkpatrick

[51] Ms. Kirkpatrick asked Ms. Waldon and/or Ms. Allen to obtain a copy of the amortization schedule from Ms. Beatty because she wanted to "try to move the process along" in the Central Division. They were not able to obtain a copy of the schedule. (Tr. 648).

[52] Ms. Kirkpatrick testified that Ms. Allen informed her that Ms. Beatty was "not happy and speaking very loudly . . . she walked out of Lenora Smith's office and slammed the door." (Tr. 642).

[53] Ms. Allen sent Ms. Kirkpatrick an e-mail dated March 27, 2003, which stated that Mr. McLennan requested paperwork on the refund that was later investigated by Mr. Incaprera. Ms. Kirkpatrick could not recall if she received that e-mail before or after Ms. Allen and Ms. Breaux reported the interest calculation problem. (Tr. 665-666).

[54] Ms. Kirkpatrick testified that the investigation became an investigation of the "documents" rather than an investigation of whether Ms. Allen was retaliated against. (Tr. 650).

terminated the meeting and was "pretty shaken up" after the meeting. (Tr. 643-645).

Prior to the meeting, Ms. Kirkpatrick and Ms. Schumacher discussed terminating Ms. Allen.[55] She also spoke with Andrea Westmoreland in Human Resources about the termination procedures. However, Ms. Kirkpatrick did not terminate Ms. Allen after the meeting with Mr. Incaprera because there were still unanswered questions. She testified that "I was not inclined to terminate somebody who had been with the company for almost 20 years when I couldn't be sure what happened." (Tr. 645-646). By the end of the meeting, it did not appear to Ms. Kirkpatrick that Mr. Incaprera was actually investigating the matter and she reported her belief to Mr. McMillan, counsel for the audit committee. (Tr. 647).

On June 26, 2003, Ms. Kirkpatrick received an e-mail from Virginia Williams, the supervisor of the customer service group that handled Central Division refunds. (Tr. 649; CX-5). Ms. Williams received a field complaint regarding the timing of a refund and explained that refunds could take several weeks. According to Ms. Williams's e-mail, Mr. McLennan contacted Ms. Williams and informed her that Special Projects had a turnaround time of 24 hours. He further advised her to "be careful of what [she] put in writing." (Tr. 649; CX-5). Ms. Kirkpatrick was upset by the e-mail because she felt Mr. McLennan was "strong-arming or bullying" one of her supervisors. (Tr. 650).

On June 26, 2003, Ms. Kirkpatrick forwarded Ms. Williams's e-mail to Ms. Schumacher, along with a log showing that a 24-hour turnaround time was "outrageous." (Tr. 650, 676, 684; CX-98). Her main concern was that Mr. McLennan was pressuring her employee to say something that was untrue. (Tr. 677, 682). Ms. Kirkpatrick believed Mr. McLennan should have initially contacted her, rather than directly contacting one of her reports. (Tr. 677). Ms. Schumacher began investigating the delays in the Central Division Records Management Group, rather than investigating Mr. McLennan's actions towards the employee. (Tr. 649-651). However, Ms. Kirkpatrick agreed that she also wanted Ms. Schumacher to look into the timing of refunds. (Tr. 676).

Ms. Waldon expressed concerns to Ms. Kirkpatrick about refund delays and violations of Texas and Missouri state laws.

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[55] Ms. Kirkpatrick actually sent an e-mail to Ms. Schumacher concerning the possible termination of Ms. Allen. (Tr. 658; RX-4).

(Tr. 651). Mr. Crane reviewed all expense reports, but Ms. Kirkpatrick found it "unusual" when he began to monitor Ms. Waldon's expenses because he often had Ms. Kirkpatrick review the reports on his behalf and report anything "unusual or out of line." (Tr. 652).

Ms. Kirkpatrick believed the Complainants were stonewalled by the SSC. She believed the stonewalling affected their ability to perform their jobs. Ms. Kirkpatrick testified that the Complainants were left out of meetings, not informed of procedure changes, and "left out of the loop." (Tr. 653). Mr. Docampo was also being cut out of e-mails, "stonewalled," and left out of procedural changes. (Tr. 678-679). She reported to Ms. Schumacher and Mr. Sprick that her "direct reports" were being retaliated against by Ms. Beatty, Ms. Smith, and Mr. McLennan. (Tr. 654). She left Stewart in September 2003 and nothing had been done to address the retaliation. (Tr. 654).

Kenneth Budde

Mr. Budde had been the "interim CEO" for Respondent for approximately 13 weeks at the time of formal hearing. He began employment with Respondent in May 1984 and was promoted to CFO in May 1998. (Tr. 1322-1324).

He testified that Respondent is divided into a trust company, a corporate division, and four operating divisions. The corporate division is principally responsible for support operations, accounting, treasury, internal audit, information technology, and SSC. (Tr. 1324). The operating divisions are responsible for running and managing the 250 funeral homes and 150 cemeteries under Respondent's control. Each of the four divisions differs in size. (Tr. 1324-1325).

Although Respondent underwent other reorganizations, the December 3, 2003 reduction in force was the only RIF during Mr. Budde's employment with Respondent. (Tr. 1325-1326). In June 2003, Respondent's Chief Operating Officer (COO) resigned and Bill Rowe, Respondent's CEO, took on the duties of the COO. Mr. Rowe decided to reduce Respondent's costs because the funeral business had declined over the previous five years. Mr. Rowe and Mr. Budde discussed the cost reductions and met with the Board of Directors. (Tr. 1326-1327).

Mr. Rowe and Mr. Budde decided to implement a cost reduction of $20 million. They considered the assets managed by Respondent and decided to eliminate some of its businesses.

They anticipated the elimination of 200 jobs through the sale of businesses and the elimination of 300 jobs from the businesses Respondent continued to operate. (Tr. 1327-1328). Mr. Rowe discussed the reduction in costs with the divisional presidents and assigned each division a pro rata proportion based on revenues of the total reduction amount.[56] (Tr. 1329). When the reductions reached the $20 million dollar amount, the total RIF number was 292. Mr. Rowe anticipated the elimination of an additional 100 positions through attrition, whereby Respondent would not replace employees who leave the company. (Tr. 1330).

The division presidents were not given specific instructions on how to reach their assigned cost reductions. They were simply assigned their pro rata portion and had "some idea of what the headcount reduction needed to be."[57] (Tr. 1330). No other guidelines were provided and nothing was set forth in writing. (Tr. 1332-1333; 1358). Mr. Budde testified that the cost reductions were to be effective for the start of fiscal year 2004 or November 1, 2003. All non-employee cost reductions were effective by November 1, 2003, but Respondent was not prepared to make the labor reductions until December 3, 2003.[58] (Tr. 1331).

With respect to the RIF, Mr. Budde and Respondent were focused on "dollars." He estimated that $9 million in "labor costs before benefits" could be achieved by identifying 300 employees for elimination in the RIF. Mr. Budde did not see the list of terminated employees until after the RIF occurred. Prior to that time, he "mainly worked with the information in terms of headcount and dollars." [59] (Tr. 1340).

Mr. Budde testified that Respondent's financial performance has improved significantly since the RIF. (Tr. 1338-1339).

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[56] Each division president was assigned a pro rata proportion of the total $20 million dollar reduction. Mr. Budde testified that the division presidents' "first objective was to get the money out." The division presidents determined how to reach their goals and determined the extent of the necessary labor cuts with their own divisions. (Tr. 1355-1356). However, the division presidents were verbally given "general guidelines" to reach a target number of dollars in relation to the labor force. (Tr. 1357-1358).

[57] Mr. Budde was not assigned a specific amount for budget cuts within the Corporate Division because the Corporate Division did not generate any revenue. He was not instructed to cut a specific number of employees. He "just knew [he] had to go in and take out as many employees as possible in the Corporate Division." (Tr. 1359-1360).

[58] Mr. Budde provided a dollar breakdown of the $20 million cost reduction. (Tr. 1335; CX-9).

[59] Mr. Budde and the division presidents did not discuss which positions to include in the reduction. (Tr. 1340).

Neither he nor any of the division presidents received a bonus in 2003. (Tr. 1339). He did not undergo a reduction in pay. (Tr. 1361).

Mr. Budde worked with Dennis Lafont before his employment with Respondent. He knew that Mr. Lafont had "gotten himself in a mess" with a former employer, but did not know the exact nature of Mr. Lafont's conviction until after his deposition. (Tr. 1342, 1361). Mr. Lafont was convicted of one count of conspiracy to commit mail fraud. (Tr. 1341). Internal Audit has examined the data that Mr. Lafont may access and determined that he does not have access to any data or records that would affect Respondent's financial statements. (Tr. 1343). Mr. Lafont documents Respondent's "internal controls." (Tr. 1363).

Through the present matter, Mr. Budde became aware that Ms. Waldon alleged that he lied or misled the public during the September 2003 earnings call.[60] (Tr. 1345; RX-61). Mr. Budde testified that he commented that revenue had declined because of fewer "deliveries" to Respondent's cemeteries. He explained there were two reasons for the decline: (1) events in cemeteries were "down period over period," and (2) the sets of merchandise delivered differ from family to family. According to Mr. Budde, the "anomaly" was that he could not explain the "mix" of merchandise that was being delivered. He could not explain whether more of one product was being delivered over another type of product in each period. (Tr. 1348-1350). His comment referred to Respondent's "cemetery business," as opposed to Respondent's "funeral business." (Tr. 1377).

Respondent files consolidated financial statements with the SEC.[61] Mr. Budde testified that "period end" adjustments are made to the consolidated statements on a quarterly basis. Mr. Budde further testified that many companies make "period end" adjustments and that Respondent's outside auditors are aware that Respondent does so. (Tr. 1352-1353).

Mr. Budde testified that there is no obligation to "push numbers down" to the divisions. Respondent has an obligation to ensure that its filings are "accurate and correct" which can be achieved by making adjustments in "consolidation." As to the

[60] Respondent holds quarterly earnings conference calls which are open to the public. Investors participate in the conference calls to ask questions. (Tr. 1343-1345).

[61] Mr. Budde testified that a "consolidated statement" combines the accounting information for all the business units and divisions into one statement which is filed with the SEC. (Tr. 1352).

purpose of "push down" adjustments, Mr. Budde stated that "typically the push down issue has to do with how you want to provide the information to management in the field, when you want to provide it . . . ." (Tr. 1366). He testified there are entries that routinely do not get pushed down at the time of the filings due to a "timing issue." (Tr. 1367).

Respondent prepares a document referred to as a "Vary Report" which is not SAB-101 compliant because it is used in internal management of the business. (Tr. 1380; CX-77). In fiscal year 2001, which commenced November 1, 2000, Respondent began making SAB-101 adjustments to the documents it submitted to the SEC. Mr. Budde was not informed of Ms. Waldon's complaints regarding non-compliance with SAB-101. (Tr. 1381).

The Board of Directors became aware of the interest calculation problem approximately one year prior to formal hearing because the problem was not "material" or "significant."[62] (Tr. 1365, 1371). Respondent did not inform the stockholders of the problem. Mr. Budde testified that untimely refunds and the resulting possible violations of state law were issues that were not brought to his attention. (Tr. 1365).

Respondent did not review accounts before 2000 to determine the impact of interest miscalculations. Mr. Budde testified that Respondent does properly compute interest. The interest calculation errors occur only on premature payments which comprise "an insignificant number of the interest calculations" performed by Respondent. (Tr. 1368-1369). Respondent does not perform a manual calculation "every time a customer prepays" or "every time a customer pays off an account." (Tr. 1372).

Complainants did not make any complaints to Mr. Budde during their employment with Respondent, nor was Mr. Budde aware of any complaints made by Complainants prior to receiving notice of the instant cases. (Tr. 1341).

Ken Stevens

Mr. Stevens attended undergraduate college at Wake Forest University and attended the University of North Carolina Law School. At the time of formal hearing, Mr. Stevens had been employed by Respondent as the President of the Eastern Division

[62] Mr. Budde testified that the Board became aware of the interest calculation problem as early as January 2003. (Tr. 1374).

since February 2000. (Tr. 1149-1150). Prior to the RIF, the Eastern Division consisted of 110 businesses in three regional areas and approximately 1,000 employees. (Tr. 1150, 1155, 1167).

In May 2003, Bill Rowe began acting as the Chief Operating Officer (COO). In August 2003, Mr. Rowe announced four "initiatives," one of which was a "cost-cutting initiative." As a result of the cost-cutting initiative, Mr. Stevens "took a harder view of costs" in the budget he submitted on September 15, 2003. (Tr. 1151-1152). During a conference call, however, Mr. Rowe informed Mr. Stevens that he his budget "would not fly." The division presidents were told that $10 million in costs had to be taken out of the business and each division president was assigned a proportionate "target number."[63] (Tr. 1153-1154).

Mr. Stevens was not given instructions on how to reach his "target number" because each division was responsible for arriving at its appropriate budget amount.[64] (Tr. 1156-1157, 1200-1201). Mr. Steven finalized all "non-labor cuts" and was informed that $10 million of labor also had to be removed from the budget through labor reductions throughout the company.[65] (Tr. 1156-1157). Each division was assigned a proportionate dollar amount based on its revenue for the company. (Tr. 1158). Mr. Stevens was assigned approximately $2 million in reductions for his division. Mr. Stevens did not receive instructions as to how to arrive at the amount of his assigned cost reductions, but he was aware that the eliminations should not "negatively impact customer service." (Tr. 1159, 1170-1171).

Mr. Stevens testified that his initial eliminations were "support functions and excess layers of management" that did not interact with customers on a daily basis. He testified that he identified the QA position as a disposable "support" function "early in the process," along with many other positions that were ultimately eliminated. (Tr. 1159-1160; 1176-1177). He eliminated the "position, not the person." (Tr. 1178). After

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[63] The initial budget reductions were to be taken from "non-labor" costs. (Tr. 1153). The Eastern Division's non-labor costs target was $2.7 million. (Tr. 1155).

[64] Mr. Stevens did not recall receiving any written information about the RIF. He did not recall receiving any e-mails and testified that no minutes were kept at the monthly meetings. (Tr. 1183-1185).

[65] Initially, a reduction in headcount of 300 employees was suggested. However, Respondent ultimately decided to base its cuts on a monetary amount. An average salary was assumed to be $30,000.00 to $35,000.00 which allowed them to arrive at a monetary amount of $10 million dollars. (Tr. 1157-1158).

compiling the initial list of eliminations, Mr. Stevens met with executives from each of the three regions in the Eastern Division to discuss additional labor cuts. He "split" the remaining dollar amount among the three regions and accepted recommendations from the regional executives about other positions to be eliminated.[66] (Tr. 1161-1162).

Mr. Stevens accepted Jim McLennan's recommendation to combine quality control into the "CAFE," which could be "absorbed" by "the SSC with very little if any additional costs." Each division individually decided whether or not to accept Mr. McLennan's recommendation. (Tr. 1163). At a senior executives meeting, the division presidents discussed their lists of labor cuts. Mr. Stevens had already placed his QA representative on his elimination list. He learned the division presidents for the Central and the Southern divisions had also included their QA representatives on each respective elimination list. (Tr. 1163-1165). The QA position for the Western Division was not included on the elimination list because "it was a different position." (Tr. 1165).

The RIF was a confidential process. Information about the RIF was communicated to those people who were actually going to "take care of the termination" on December 1, 2003. (Tr. 1165-1166).

On cross-examination, Mr. Stevens testified that he was very familiar with the QA position and did not refer to any documents before deciding to eliminate the position. The document that he received from Mr. McLennan did not bear on his decision to eliminate the QA position because the decision had been made prior to the receipt of the document. (Tr. 1167-1168).

Mr. Stevens could not recall the timeline of when his budget and his budget revisions were submitted to Mr. Rowe for approval. (Tr. 1172-1173). He testified that he did not have documentation to support his reasons for eliminating the positions that were included in the RIF, nor could he recall how many positions he eliminated from his division during the RIF. He testified that he knew Ms. Breaux's position could be

[66] Mr. Stevens testified that he felt the executives were "in a better position to determine the field positions . . . . because they worked with these folks and these cemeteries and funeral homes on a day-to-day basis." (Tr. 1161-1162).

eliminated because it was a "divisional position."[67] (Tr. 1173-1147).

Mr. Stevens testified that the RIF was a restructuring of the department, but it was "not redeployment as much as elimination." Respondent was not adding as many positions as it was eliminating. Therefore, the division presidents did not discuss transferring employees between divisions to "fill positions." (Tr. 1194-1195). Consequently, Mr. Stevens did not review Ms. Breaux's employment record to determine whether or not she was suited for another function within the division. (Tr. 1178). Mr. Stevens testified that he retained other employees whose positions were eliminated, but stated that the employees were in "operational positions." According to Mr. Stevens, employees do not usually transfer from "operational positions" to "support positions" or vice versa. (Tr. 1179-1180).[68]

At a meeting in late September or October 2003, Mr. Tullier saw Mr. Stevens's RIF list. Mr. Stevens testified that Mr. Tullier agreed the QA position should be eliminated. Mr. Tullier did not inform Mr. Stevens that Ms. Breaux had complained about "protected activity." (Tr. 1191-1192). Mr. Stevens also discussed the eliminations with the HR Director, Peggy Fowler, and his regional executives. (Tr. 1192-1193).

Mr. Stevens approximated that he eliminated 13 positions at the divisional level and 65 positions at the regional and field levels. (Tr. 1207).

Randall Strickland

Mr. Strickland, who testified at formal hearing, had been employed by Respondent since 1997. Prior to working for Respondent, Mr. Strickland owned three funeral homes in Long Beach, California, under the entity "Strickland and Snively." He sold the funeral homes to Respondent in late 1996 and closed the business in February 1997. He has been in the funeral industry since 1965. In April 2000, he became the Division President of the Western Division. (Tr. 1209-1210).

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[67] The number of "divisional positions" was limited, so he knew the divisional employees and their job functions "very well." (Tr. 1174).

[68] He recalled two positions that were created and offered to employees without following the posting procedure. The positions were cemetery operations positions that involved managing cemeteries at the local level. (Tr. 1195-1196).

The Western Division consists of approximately 600 employees and is located in California, Oregon, Washington, and Nevada. Mr. Strickland testified that the Western Division handles the largest number of deaths, but is the smallest division in terms of revenue. At the time of hearing, the Western Division had five or six cemeteries and about 60 funeral homes. (Tr. 1211-1212). The Western Division initially had two RMCs, but Mr. Strickland merged the two RMCs and operates only one center in San Ramon, California. (Tr. 1212). At the time of hearing, the Western Division did not have a Director of Administration. (Tr. 1215).

Mr. Strickland testified that the Western Division had a QA representative in New Orleans until Rhonda Burkhoff left the position in March or April 2002. (Tr. 1215-1217). After Ms. Burkhoff's departure, Mr. Strickland decided the division did not want a QA representative "per se." Instead, the division hired an existing employee to do administrative training. Mike Koester was hired into the position. (Tr. 1216-1217). Mr. Koester was based in San Diego, California. His duties did not include "CAFE administration." (Tr. 1217).

In June 2003, Bill Rowe set out four company initiatives, which included cost reduction. In September 2003, Mr. Strickland was informed, via a conference call, that the cost reduction plan included a "reduction of staff." He recalled hearing that 300 employees would be eliminated to arrive at the cost reduction goal of $9 or $10 million. (Tr. 1218-1221). Based on the Western Division's "revenues as a percentage of the total revenue of the company," Mr. Strickland received a "dollar figure" for his division's budget cuts. (Tr. 1222-1223).

Mr. Strickland did not receive instructions on which positions to include in the RIF and the ultimate decision for the Western Division was left to his judgment. (Tr. 1218, 1223). Mr. Koester was not included in the December 3, 2003 reduction in force since "Rob Ellis made a case for [the Western Division] retaining him because he thought that the function that [Koester] was providing was valuable to [the Western Division]." (Tr. 1217-1218). Prior to learning of the cost reduction initiative and the reduction in force, Mr. Strickland had already merged and closed locations within the Western Division. He stated that he "didn't have to do as much as maybe the other division presidents had to do" because of his earlier actions. (Tr. 1224-1225).

Mr. Strickland received suggestions from Jim McLennan regarding reductions with the RMCs and transferring certain functions to New Orleans. Mr. Strickland considered the suggestions from Mr. McLennan but decided against implementing them in the Western Division. (Tr. 1225-1226).

With regard to the reduction in force, Mr. Rowe's instructions were to maintain the quality of service. Consequently, Mr. Strickland tried not to eliminate employees who were "delivering services to the families." In making his decision, Mr. Strickland considered the "particular functions." Among the positions he considered were the IS department, the office workers, and telemarketing groups. He also considered positions with larger salaries. (Tr. 1228-1229).

In connection with the RIF, Mr. Strickland eliminated between 25 and 28 positions. He estimated that ten or twelve of those positions were eliminated from the divisional level. (Tr. 1230).

Michael Crane

At formal hearing, Mr. Crane testified that he has worked for Respondent for forty years. He has held the position of President of the Central Division since 2000 and reports to Kenneth Budde, Respondent's CFO and interim CEO. (Tr. 1239-1242).

Mr. Crane testified that the Central Division is Respondent's largest division with approximately 1,400 employees before the RIF, operating approximately 90 businesses in 13 states. The Central Division generates the greatest portion of Respondent's revenue at approximately $150 million. (Tr. 1242, 1315).

Mr. Crane knew Ms. Waldon when she worked for Respondent. When Ms. Waldon tendered her resignation in December 2001, Mr. Crane suggested that Sharon Kirkpatrick discuss moving her to a divisional position with a salary increase.[69] (Tr. 1242-1244). With approval from Mr. Crane and the HR department, Ms. Kirkpatrick offered Ms. Waldon a position as "finance manager" without following Respondent's job posting procedure. (Tr. 1278-1279).

[69] Mr. Crane denied that an employee only had a future with Respondent if the employee moved to New Orleans and he further denied making such a statement to Ms. Waldon. (Tr. 1245).

In May 2003, Mr. Crane approved Ms. Waldon for the position of Director of Administration on the condition that Ms. Kirkpatrick worked with her on three areas: (1) following Respondent's internal audit or cash procedures; (2) her relationship with the SSC and Jim McLennan;[70] and (3) establishing an understanding of her reimbursable expenses.[71] (Tr. 1252-1253).

Although Mr. Crane intended to meet with Ms. Waldon for 30 to 40 minutes on her first day in the New Orleans office, he was only able to meet with her for five minutes. (Tr. 1254-1255). At the time she arrived in New Orleans, Ms. Waldon was provided with a temporary work space until an "enclosed office" could be built. Mr. Crane was not aware of any objections to her workspace arrangements. Although there were construction delays, Ms. Waldon was situated in "an enclosed, private office" at the time she left the company. (Tr. 1255-1256). Ms. Waldon was provided rental car expenses during the first 60 days of her DOA employment pending availability of a company car. (Tr. 1253).

Ms. Waldon complained to Mr. Crane about untimely refunds. He addressed the refund issue with Mr. McLennan, who was aware of the delays and was hiring additional people to help remedy the problem. Ms. Waldon was not the only employee to complain about delayed refunds. (Tr. 1257). After Ms. Kirkpatrick left the company, Ms. Waldon complained to Mr. Crane about the error rate for the Central Division. Ms. Waldon believed the Central Division was "being picked upon" and that Mr. McLennan's department did not have "standard procedures to define what an error was." Mr. McLennan assured Mr. Crane that the Central Division was being treated the same as the other divisions. The Central Division's error rate continued to be the highest of all divisions at the time of formal hearing. (Tr. 1258). Ms. Waldon did not complain to Mr. Crane about issues pertaining to a payment application problem or an interest calculation problem. (Tr. 1259-1260). Ms. Waldon did not complain to Mr. Crane that Mr. McLennan retaliated or discriminated against her. (Tr. 1307). If the SSC's delay in calculating refunds violated Texas and Missouri law, Mr. Crane expected his employees to bring the violation to the attention of the SSC without suffering retaliation. (Tr. 1286).

[70] Phil Sprick informed Mr. Crane of issues between Ms. Waldon and Mr. McLennan. (Tr. 1254).

[71] Ms. Waldon was working in New Orleans and maintaining a residence in Kansas City. (Tr. 1253).

Mr. Crane testified that he began reviewing all expense reports, including Ms. Waldon's expense reports, because the senior executives wanted to reduce travel expenses. (Tr. 1256-1257). Mr. Crane would question Ms. Waldon's weekly itinerary to ensure that Ms. Waldon complied with the "memo of understanding" and to stay informed of Ms. Waldon's whereabouts.[72] He was concerned about compliance with the "memo of understanding" because Ms. Kirkpatrick "did not agree with the part of the agreement in what we would compensate and not compensate." (Tr. 1290).

In September 2003, Ms. Kirkpatrick resigned from her position as CFO.[73] Mr. Crane testified that he considered Ms. Waldon for the position even though she had not held the position of Director of Administration for a full six months. Mr. Crane offered the CFO position to Beth Schumacher, who had declined an earlier offer of the position in late 2000 or early 2001. (Tr. 1246-1249).

Prior to September 2003, Mr. Rowe set forth a goal of reducing costs by $10 million. At the senior executives meeting in September 2003, Mr. Rowe increased the goal to $20 million dollars and indicated that the reduction in costs would involve a reduction in force. Mr. Rowe did not provide written instructions regarding the cost reductions, but indicated that the quality of service provided to families should not be affected. Mr. Crane testified that Mr. Rowe wanted to achieve the $20 million reduction through the elimination of 300 positions. Each division received an assigned amount of reductions based on a pro rata share of Respondent's revenue. The total reductions for the Central Division were estimated to be $3 to $3.5 million. (Tr. 1260-1261).

Mr. Crane met with Andrea Westmoreland, the HR director for the Central Division, to discuss the elimination of positions. Mr. Crane made or approved all the decisions on which positions to include in the reduction in force. (Tr. 1262, 1294). Ms. Waldon's name was not included on the original list of eliminations, nor did her name arise in the discussions with Ms.

[72] In May 2003, a "memo of understanding" was composed to establish agreement between Ms. Waldon and Ms. Kirkpatrick regarding compensation for Ms. Waldon's travel expenses. (Tr. 1250-1252; CX-68). As the Director of Administration, Ms. Waldon would travel between three RMCs located in Kansas City, Missouri; Dallas, Texas; and New Orleans, Louisiana. (Tr. 1260).

[73] Ms. Kirkpatrick was hired into the CFO position in late 2000 or early 2001. At that time, Ms. Waldon had also interviewed for the CFO position. (Tr. 1246).

Westmoreland. (Tr. 1263). When making the eliminations, Mr. Crane looked mostly at "back office people or support people." He included the QA position in the original list [Ms. Allen] because the QA representatives did not meet with clients.[74] Further, he felt the RMC managers could be the "liaison" to the SSC. (Tr. 1262, 1265-1266). At the time of hearing, the QA function was performed by the two managers of the two RMCs. (Tr. 1268).

In addition to consulting with Ms. Westmoreland, Mr. Crane also sought Ms. Waldon's suggestions for cost cutting on the "administrative side." He asked Ms. Waldon to devise a plan to consolidate the three RMCs into two RMCs. Ms. Waldon suggested the elimination of the New Orleans RMC. Mr. Crane informed her that the New Orleans RMC could not be eliminated and that he intended to eliminate the Kansas City center.[75] (Tr. 1266-1267). Ms. Waldon "vehemently" disagreed with Mr. Crane's plan to move FSP to New Orleans and indicated that it would result in a substantial number of lawsuits. Mr. Crane asked Ms. Waldon for assistance in achieving his goals and instructed her to continue the meeting with Ms. Schumacher to discuss eliminations. (Tr. 1270-1271).

Ms. Schumacher informed Mr. Crane that Ms. Waldon requested certain assurances regarding her employment, including a timeframe for her employment and compensation for apartment rental. (Tr. 1272, 1274). Ms. Waldon indicated that she would tender two-weeks notice if her requests were not granted. Mr. Crane asked Ms. Schumacher to work on an agreement with Ms. Waldon because Respondent needed her assistance "with getting FSP to New Orleans and tying up loose ends." (Tr. 1272). Mr. Crane approved the agreement that Ms. Schumacher tendered to Ms. Waldon. Subsequently, he met with Ms. Waldon to inform her that he was pleased that they achieved a satisfactory agreement. Ms. Waldon indicated that she "understood what the company had to do . . . she would not hold the company hostage, that she would do the right thing." (Tr. 1272, 1274). He testified that Ms.

[74] Mr. Crane did not receive any written instructions upon which to base his decision to eliminate the QA position. (Tr. 1281). He understood that the job eliminations were not to be based on employee performance. (Tr. 1304).
[75] Upon hiring Ms. Schumacher into the CFO position, Mr. Crane informed Ms. Schumacher of the RIF. He indicated that he wanted to consolidate into two RMCs and bring FSP from the Kansas City office to the New Orleans office. He told Ms. Schumacher that they would meet with Ms. Waldon to discuss which RMC employees to include in the RIF. (Tr. 1268-1269).

Waldon would still be employed by Respondent if she had not made her "demands or threat."[76] (Tr. 1273).

Mr. Crane testified that Ms. Waldon was not part of the reduction in force and that she was included on the RIF list after she chose to leave the company. (Tr. 1283; RX-20). According to Mr. Crane, Ms. Waldon made a verbal agreement to leave Respondent. Mr. Crane did not see a written agreement in which Ms. Waldon agreed to tender her resignation after a period of time. However, he did see correspondence between Ms. Waldon and Ms. Schumacher which discussed such a proposal. Mr. Crane admitted he was not part of the negotiation process and did not know whether Ms. Waldon actually agreed to the proposal. (Tr. 1284). He did not know whether Ms. Schumacher offered her another job, but testified that Ms. Schumacher had assured Ms. Waldon that Respondent would have a position for her if her position was eliminated. The "position" did not exist at the time the offer was made to Ms. Waldon, but Ms. Schumacher wanted her to know they wanted to keep her with the company. (Tr. 1296).

Mr. Crane testified that, to his knowledge, the RIF benefits package was not extended to any employees who quit prior to December 3, 2003. (Tr. 1273). Mr. Crane did not receive his bonus for 2003, but he did not experience a reduction in salary. (Tr. 1311-1312). The Central Division eliminated 78 positions, of which 15 to 18 positions were vacant at the time of the reduction in force. (Tr. 1314, 1317; RX-20). Mr. Crane posted 30 or 40 positions in the Central Division after the reduction in force. (Tr. 1319). The additional positions were mostly at the regional or field level in the areas of cemetery maintenance and sales and none at the divisional level. (Tr. 1320). None of the postings were positions that were eliminated through the reduction in force. (Tr. 1321).

Mr. Crane was not aware that Ms. Allen complained of retaliation. (Tr. 1291). If Ms. Kirkpatrick complained to the HR department that her direct reports were suffering retaliation, Mr. Crane would expect the HR department to discuss the matter with him. He testified that the HR department never discussed the alleged retaliation with him. (Tr. 1292-1293).

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[76] Mr. Crane assured Ms. Waldon that her job was secure on two occasions at the time Ms. Kirkpatrick left Respondent. (Tr. 1287-1288).

Mr. Crane did not review Ms. Allen’s personnel file, work history, or educational background. He reviewed the QA representative’s job description before he decided to eliminate it in the RIF. He was not aware that the QA representatives were having problems with Mr. McLennan in the SSC. (Tr. 1297-1298).

Mr. Crane testified that many valuable employees were terminated with the RIF. He stated that Ms. Allen was a valuable employee and the decision to eliminate her position was “extremely tough.” (Tr. 1309-1310). Nonetheless, Mr. Crane did not offer a job to Ms. Allen after she was terminated. He stated that she had access to Respondent’s job postings for a 30-day period and was informed in writing that she could post for open positions within the company. (Tr. 1279-1280). He did not offer positions to any of the “valuable” employees who were included in the RIF. (Tr. 1310).

Michael Hymel

Mr. Hymel testified at formal hearing. He is a Certified Public Accountant with a Bachelor of Science degree in Accounting from the University of New Orleans. He graduated from the University of New Orleans in 1978 and worked in public accounting for almost 12 years before his employment with Stewart. He has been employed by Stewart for 15 years and currently holds the position of Chief Accounting Officer (CAO). (Tr. 707). As the CAO, Mr. Hymel prepares the financial statements and reports for filing with the SEC. He also prepares internal financial statements for management purposes. (Tr. 708).

Mr. Hymel testified that Respondent is a provider of death-care services and merchandise in 28 states operating 256 funeral homes and 198 cemeteries. Respondent’s organizational structure includes Mr. Budde as the company’s acting CEO since Mr. Rowe’s resignation in June 2003. There are four operating divisions under the CEO and each division has a divisional president. Each divisional president has a chief financial officer (CFO). In addition to the four operating divisions, there is a corporate division. Mr. Budde is the divisional president of the corporate division and Mr. Hymel is the Chief Accounting Officer under Mr. Budde. (Tr. 709-710). Each CFO reports directly to his divisional president and has a “dotted line control” to Mr. Budde, especially in the area of financial reporting. (Tr. 710-711).

The company went public in October 1991 with a stock price of $3.94. Since going public, the stock price peaked at approximately $28.00 in April 1998. The stock price fell to $1.91 per share in December 2000 and then rose to approximately $7.50 by September 10, 2001. The price began to decline again just before the RIF at $4.85, but began to rise again after the RIF until the end of June 2004 at $8.14 a share. (Tr. 711). Mr. Hymel testified that stock prices are how Wall Street typically evaluates the performance of a company and the company's financial performance has improved since the RIF. (Tr. 712).

SAB-101 is a "Staff Accounting Bulletin" that was published by the Securities and Exchange Commission (SEC). The regulation was implemented on November 1, 2000, which is the first day of fiscal year 2001. Mr. Hymel testified that Stewart complied with SAB-101 effective November 1, 2001. (Tr. 713-714, 716). With the implementation of SAB-101, Stewart could only recognize merchandise sales at the time of delivery to the customer. Prior to SAB-101, the sale was recorded at the "point of sale" and revenue was recorded as the appropriate expense at that time. (Tr. 714-715). Mr. Hymel testified that after the implementation of SAB-101, Stewart had to do the following:

> "we had to go in, calculate all of the revenue that had been previously recognized but had not been delivered . . . [s]o we had to go back in, defer all of the previous sales that we had recorded, set up a very large deferred revenue number on our books, and then from that point on those sales and any future sales are only recognized at the point we actually turn the product over to the customer." (Tr. 715).

Costs are recorded as expenses on the financial statement and help determine Respondent's gross profit. If Stewart made a $1,000.00 sale on a vault and the cost of the vault is $200.00, Respondent's income statement would show a net profit of $800.00 on the product. Respondent ensures that the cost is correct by taking physical inventories at the end of each quarter. If the costs in the system are incorrect, Respondent uses the actual physical inventory as a "check" to ensure the correct costs. Mr. Hymel referred to the adjustment as a "top-sided journal entry" which occurs "at the consolidated level." It is recorded on the "trial balance" and Respondent later decides where the entry will be made on the books. (Tr. 719).

In 2001 and 2002, the accounts were "adjusted to their physical accounts and recorded top-sided at those particular points and time." (Tr. 720). An adjustment was also made in the third quarter of 2003, with respect to the physical inventory. The adjustment was made on "outer-burial containers on the funeral segment." (Tr. 721). The adjustments for November through December 2002 and January through February 2003 were done at the "consolidated balance trial-level." (Tr. 721).

The Central Division's consolidated report was an income statement for the first six months of fiscal year 2003, ending in April 2003. (RX-76). It is an "internal, working document" that is not submitted to the SEC. The document would not contain top-sided adjustments. (Tr. 721-722). The income statement for the full fiscal year ended on October 31, 2003. (RX-77). In the year end income statement, the year-to-date column reflected the adjustment made in the third quarter of 2003. The adjustment was recorded for the first six months of the year and recorded at the facility level in September 2003. Respondent was able to identify a particular "facility" to which the adjustments related and would make the adjustments for each "facility" or funeral home by "pushing down" the proper costs.

The adjustments for fiscal years 2001 and 2002 were not "pushed down" to the internal working documents because Respondent was not able to identify what caused the adjustments. In May 2003, Respondent was able to identify the cause of the differences and record the adjustments at each facility level. (Tr. 724-725). In the third quarter, a top-sided entry was made for the entire company which had never been done before, and nothing was pushed down. The push-down entry was recorded in September 2003. The top-sided journal entry was broken down by every funeral home and the entry was recorded at every facility level. (Tr. 738-739). The SEC does not require the push down of costs, but Stewart did it for management purposes. (Tr. 727).

SAB-101 does not affect pre-need contracts because a pre-need contract is not recognized as revenue until the time of need. There are no costs until products are delivered. (Tr. 740).

Mr. Hymel was not aware of any problems other than those with "outer-burial container costs." Respondent ensures that costs are properly reflected in the system by updating the costs from suppliers' price lists. The costs are updated at least once a year. (Tr. 731).

Mr. Hymel testified that he only met with Ms. Waldon on two occasions: (1) in July 1999 when Stewart acquired Newcomers to discuss FSP; and (2) in October or November 2003 to discuss "some testing" on FSP and a few complaints before the funeral board. (Tr. 732-734). Mr. Hymel does not recall having a discussion with Ms. Waldon about outer-burial container costs. He also does not recall having a discussion with Ms. Waldon about the "anomaly" comment made by Mr. Budde. (Tr. 734-735). Mr. Hymel was not aware whether or not Ms. Waldon had been working with Mr. Royster to "help the conversion of the FSP contracts to merge into the Stewart system." He was also not aware whether Ms. Waldon spoke to Mr. Royster or Mr. Ferguson about non-compliance with SAB-101. (Tr. 742).

Mr. Hymel testified that Respondent's financial position has improved since the reduction in force. He testified that sales have increased and costs have gone down. On December 3, 2003, Mr. Hymel did not cut anyone from the payroll in his office. His first "reduction" occurred in March 2004 and he has two more planned for October 2004. (Tr. 746-747).

Beth Schumacher

Ms. Schumacher is a CPA and has a Bachelor of Science degree in accounting from the University of Southwestern Louisiana. (Tr. 1385-1386). She began working for Respondent in 1998 as the Vice-President and Director of Internal Audit. (Tr. 559, 1387). Her primary responsibilities included conducting audits of business operations, consolidated administrative functions and accounting functions. She reviewed internal controls for effectiveness and reported her findings to "executive management and the board of directors." As the head of internal audit, Ms. Schumacher reported separately to Ken Budde (CFO) and to the audit committee, which is part of Respondent's board of directors.[77] (Tr. 514-515, 1392). On October 27, 2003, Ms. Schumacher accepted the position of CFO for the Central Division, but remained the "named Audit Director" until January 3, 2004. (Tr. 1387).

Ms. Schumacher first learned of the interest calculation problem in late 2000 during an audit of "cash receipts" in the SSC. It was determined that the interest calculation errors

[77] The head of internal audit cannot be terminated without approval of the board of directors audit committee. (Tr. 515). She reported to the audit committee and met with Mr. Budde in preparation for audit committee meetings. (Tr. 559-560).

were caused by a system problem and that the errors occurred on accounts where the customer made an early payment of principle.[78] (Tr. 1396-1398). In addition, the accounts with incorrect interest calculations showed an end credit balance. Consequently, a re-amortization had to be performed on any account with an interest calculation error and a credit balance. (Tr. 1399-1400). Special Projects was ultimately assigned to review any account with a credit balance to determine whether or not a pre-payment caused the credit balance. If the account reflected any pre-payment, the contract was manually re-amortized. (Tr. 1400-1401).

In a memorandum dated July 31, 2003, Ms. Schumacher advised Rick McMillan that the AS/400 interest calculation problem had not been fixed.[79] She recommended that the "project team should continue managing project modification and implementation."[80] (Tr. 516-518). She informed Mr. McMillan that Dennis Lafont was assigned to the "system modification project" and that "individual account correction" was delegated to Special Projects and Ms. Beatty. (Tr. 521-522). In July 2003, Ms. Schumacher informed the audit committee that the application program was ready for testing. The testing revealed "bugs" in the reprogramming effort. (Tr. 520-521). Ms. Schumacher did not inform Mr. McMillan or the audit committee that field employees continued to quote payoffs from the AS/400 because the field employees had not been instructed otherwise. (Tr. 524).

Ms. Schumacher does not believe the delay in fixing the interest calculation problem was intentional on Respondent's part. (Tr. 1403). She attributed the delay to two factors: (1) Respondent performed a "comprehensive rewrite" of the program; and (2) Respondent investigated the impact of the new program on various aspects of customer accounts, including pre-existing accounts. As a result, Respondent found errors in the new

[78] Ms. Schumacher believed the interest errors generally occurred in small dollar amounts and on a limited number of accounts. (Tr. 1399).
[79] The report does not discuss untimely refunds. Ms. Schumacher stated that Ms. Kirkpatrick alleged errors in interest calculation which she believed affected refunds. However, Ms. Kirkpatrick did not make any allegations concerning the timeliness of refunds. (Tr. 534).
[80] The project team occasionally consulted with outside counsel to ensure compliance with the legal requirements in connection with interest calculation. She was not aware of anyone consulting with counsel to determine the effect of the AS/400 errors that occurred before the year 2000. (Tr. 519).

program and had to work on various different approaches to the solution.[81] (Tr. 1403-1405).

In March 2003, Mr. McMillan contacted Ms. Schumacher about an audit committee investigation of allegations by Ms. Kirkpatrick. (Tr. 1392). Ms. Kirkpatrick asked Ms. Schumacher to interview Ms. Allen and Ms. Breaux for information concerning delayed refunds due to interest calculations. Ms. Schumacher testified that the interest calculation problem was not a secret and fully discussed the internal audit investigation back to 2000 with Ms. Kirkpatrick. (Tr. 1405-1406).

On April 28, 2003, Ms. Schumacher met with Ms. Allen to discuss her concerns regarding refunds and the SSC. (Tr. 529-530). Ms. Allen also complained to Ms. Schumacher that her "performance was hindered" and indicated that Ms. Breaux was concerned about retaliation. In addition, Ms. Allen informed Ms. Schumacher that "all hell breaks loose" when she brings "field issues to the SSC." Ms. Allen also notified Ms. Schumacher that she was not copied on e-mails and that she felt "intimidated" when Mr. McLennan stated that he would bring her concerns to the "SEC." (Tr. 537-540; CX-26). Ms. Allen briefly discussed the conversation between Ms. Apolinar and Ms. Breaux, but did not bring up any other concerns with respect to interest calculation or payment application. (Tr. 1408-1409).

Ms. Schumacher also met with Ms. Breaux on April 28, 2003. Ms. Breaux identified problems with delayed refunds and duplicate refunds. (Tr. 541). Ms. Breaux was concerned that the interest calculation issue was not communicated effectively and believed that all RMCs should have the "template" to do manual calculations. Ms. Schumacher and Ms. Breaux discussed her conversation with Ms. Apolinar.[82] (Tr. 1406-1408). Ms. Breaux indicated that she did not want her name brought up in

[81] Internal audit "advised" the team that worked on the interest calculation problem. She participated on the "team," but "substituted" herself with Jeff LeBlanc when the work became more "program oriented." (Tr. 555). She believed the interest calculation errors occurred when a customer prepaid his principal amount. She was not aware that Mr. Lafont discovered calculation errors on accounts where payments were not made on time, every time. (Tr. 556).

[82] Ms. Schumacher spoke to Ms. Apolinar regarding her conversation with Ms. Beatty. Ms. Apolinar informed Ms. Schumacher that Ms. Beatty explained the interest calculation problem and provided her with a "calculation template." Ms. Schumacher asked Ms. Apolinar whether or not Ms. Beatty used the phrase "hush-hush." Ms. Schumacher testified that Ms. Apolinar explained the phrase "hush-hush" was her own wording or her impression that Respondent was not "broadcasting" the interest calculation problem. (Tr. 1410-1411).

connection with the issues she raised because a tense environment already existed.[83] (Tr. 541-542; CX-27). Neither Ms. Allen nor Ms. Breaux expressed concerns of retaliation to Ms. Schumacher. (Tr. 1412).

Ms. Schumacher discussed the meetings with Mr. McMillan and provided him with her handwritten notes. Mr. McMillan instructed Ms. Schumacher to "move on." (Tr. 542-543, 1413). She "interpreted" Mr. McMillan's instructions to mean that Ms. Allen and Ms. Breaux raised HR issues; Ms. Schumacher believed he wanted her to continue investigating Ms. Kirkpatrick's allegations.[84] (Tr. 543-545). Ms. Schumacher was interviewing Ms. Allen and Ms. Breaux at Ms. Kirkpatrick's request and they had not come forward voluntarily with complaints or allegations. (Tr. 544). However, she did not understand that Mr. McMillan would go forward with an HR investigation of Ms. Allen's and Ms. Breaux's complaints while she continued the investigation involving Ms. Kirkpatrick. (Tr. 546).

Ms. Kirkpatrick informed Ms. Schumacher of retaliation against her direct reports. Ms. Schumacher informed Mr. Sprick that Ms. Kirkpatrick complained of retaliation against her employees. Although the allegations of retaliation concerned Ms. Schumacher, it was not her job responsibility to investigate such allegations. (Tr. 525-526, 1413-1414).

Ms. Schumacher testified that Ms. Kirkpatrick was very upset upon receiving the June 26, 2003 e-mail from Virginia Williams. (Tr. 546; CX-5). According to Ms. Schumacher, Ms. Kirkpatrick felt that Mr. McLennan was trying to intimidate her employees. Ms. Schumacher investigated the situation by "backtracking through all of the data, all of the details in that e-mail" and reviewing the online refund log. She spoke with Ms. Williams, Janet Pretlove, and Ms. Beatty. Ms. Schumacher also questioned Mr. McLennan. (Tr. 547).

Specifically, Ms. Schumacher met with Ms. Kirkpatrick and reviewed the "e-mail" stream. She noted that the refund in question remained in the RMC for four weeks without being forwarded to the SSC for processing. (Tr. 1454-1455). Ms. Schumacher reviewed the refund log with Ms. Beatty, which showed

[83] Ms. Schumacher testified that Ms. Breaux made the request because she felt she was viewed "differently" for maintaining a friendship with Catherine Lenihan. (Tr. 1412).

[84] Ms. Kirkpatrick also filed complaints of discrimination against Respondent which are not the subject of this case and about which a Protective Order issued by the undersigned.

that Respondent did not meet a turnaround time of 24 hours. According to Ms. Beatty, the goal was a turnaround time of three to five days with a turnaround in 24 hours under "extraordinary circumstances." Ms. Beatty also informed Ms. Schumacher that the refund log was incorrect and provided her with an updated log which showed fewer outstanding refunds. (Tr. 1456-1458). Ms. Schumacher discussed the remaining outstanding items with Ms. Smith. Ms. Smith indicated that her team became responsible for all refunds with no advanced preparation. (Tr. 1458-1459). Ms. Schumacher also met with Mr. McLennan to discuss his conversation with Ms. Williams. She testified that he contacted Ms. Williams because he believed she worked for Brenna Bennett and did not understand why she was involved with the refund issue. (Tr. 1459-1460). Finally, Ms. Schumacher advised Mr. Sprick to investigate the allegation of intimidation. (Tr. 1460).

Ms. Schumacher provided Mr. McMillan with a report of her investigation of the conversation between Mr. McMillan and Ms. Williams. (Tr. 1462; RX-62). In the report, she concluded that Ms. Kirkpatrick's group contributed to the delay in the refund at issue. She also concluded that Respondent did not achieve refund turnaround times of either 24 hours or one week. Lastly, Ms. Schumacher concluded that Mr. McLennan likely did not intend to intimidate Ms. Williams, but he exercised poor judgment in failing to address the matter with Ms. Williams's supervisor. (Tr. 1464-1465).

Ms. Schumacher's department investigated Ms. Allen in connection with the allegations of altered documents. Mr. McLennan requested copies of documents that were allegedly altered and Ms. Kirkpatrick informed Ms. Schumacher of his request. (Tr. 529, 1467). Ms. Schumacher agreed to investigate the allegations of altered documents, but did not recall any allegations of retaliation against Ms. Allen. (Tr. 1467-1468). At the end of the investigation, Ms. Kirkpatrick expressed concern that the investigation was retaliatory; Ms. Schumacher advised her to bring such concerns to the attention of Human Resources.[85] (Tr. 529-530). Ms. Schumacher assigned the investigation to Jim Incaprera and did not discuss the altered documents investigation with Ms. Allen during their meeting on April 28, 2003. (Tr. 529; 1468).

[85] Ms. Schumacher subsequently stated Ms. Kirkpatrick claimed Mr. McLennan's pulling the alleged altered refund was retaliation against Ms. Allen. (Tr. 1495-1496).

Ms. Schumacher was copied on an e-mail dated May 3, 2003, which indicated that Ms. Kirkpatrick contemplated firing Ms. Allen. Ms. Schumacher informed Ms. Kirkpatrick that she was being "presumptuous," as the investigation was not complete. (Tr. 1470).

On October 27, 2003, Ms. Schumacher gave up her position as the head of internal audit to become a CFO under Mike Crane, which she considered a "lateral move."[86] Ms. Schumacher testified that Mr. Crane immediately asked her to provide suggestions for division changes in relation to the RIF, which she provided by the end of her first week in the CFO position. (Tr. 561, 1391, 1415). When she met with Mr. Crane on October 27, 2003, he had already made the decision to include Ms. Allen in the RIF. (Tr. 569, 1415).

Ms. Schumacher recommended "positions," not individuals, within the finance and administration group for inclusion in the RIF. Mr. Crane informed Ms. Schumacher that he wanted to close the RMC in Kansas City and bring FSP to the SSC in New Orleans. She identified employees related to the Kansas City center. (Tr. 1415-1416). Mr. Crane also planned on "bringing more of the administrative functions from operations into the Shared Service Center," which Ms. Schumacher discussed with Mr. McLennan. On October 31, 2003, Ms. Schumacher suggested to Mr. Crane that "CAFE" and customer service could be brought into the SSC. (Tr. 1417-1418). Ms. Waldon was included in the October 31, 2003 meeting and strongly disagreed with the plan to bring FSP to New Orleans. Ms. Waldon did not believe anyone at Stewart could "effectively administer those accounts" and she believed it would subject Respondent to litigation by "third-party associates." (Tr. 1418-1419).

Ms. Schumacher testified that she never decided to include Ms. Waldon's position in the RIF. (Tr. 562). Ms. Schumacher informed Ms. Waldon that she could not guarantee job security for any employee, including herself. Ms. Schumacher told Ms. Waldon that she had no knowledge that Ms. Waldon's position was to be affected by the RIF and that she had no intention of eliminating the position. (Tr. 1425). She stated that she informed Ms. Waldon that there would be "structural changes within the unit" and that "continuing to have an additional layer of management within the administrative function would be

[86] In 2001, Ms. Schumacher declined an offer of the CFO position because she felt she needed to continue working with the Internal Audit group. By 2003, she had completed the Internal Audit "building process" and felt it was time for a change whereby she could work with "operations." (Tr. 1389-1390).

questioned." (Tr. 562-563, 1425-1426, 1477-1478). Consequently, Ms. Waldon's position would be eliminated; however, Ms. Schumacher maintained that the elimination would not have occurred in the RIF of December 2003. (Tr. 562-563).

Ms. Schumacher informed Ms. Waldon that the Director of Administration position was not a "viable" long term position in response a direct question from Ms. Waldon. She did not consult with Human Resources before making such statement. Ms. Schumacher was familiar with Ms. Waldon's skills, competency, and experience and it was because of that familiarity that she "asked her to stay long term in an altered, in a different capacity somewhere down the road." (Tr. 564-565). More specifically, Ms. Schumacher asked her to remain in the Director of Administration position and consider transferring to a training position in the future.[87] (Tr. 571, 1478). Ms. Schumacher testified that she did not have any documentation used in determining that Ms. Waldon's position should be eliminated. (Tr. 562). She also did not have anything in writing regarding the "newly offered position." (Tr. 570).

On November 5, 2003, Ms. Waldon set forth a "list of demands." Ms. Schumacher understood that Ms. Waldon was tendering her resignation "effective this moment" if her requests were not met. (Tr. 1427-1428). The "demands" included a "timeline for this transition process," consideration of her out of pocket expenses in New Orleans, assurances regarding her 2003 bonus, and a severance plan. (Tr. 1428-1429).[88] Ms. Waldon and Ms. Schumacher engaged in a series of e-mails concerning the status of an agreement. (Tr. 1435-1436; RX-22; RX-23; RX-24).

On November 25, 2003, Ms. Schumacher sent a separation agreement to Ms. Waldon. Ms. Waldon did not accept the separation agreement as written and requested several changes. (Tr. 575; RX-26). Respondent complied with all of Ms. Waldon's requested changes, except Respondent did not reword the 2004 bonus on the final proposal. (Tr. 575, 1439-1442; RX-27). Neither Ms. Waldon nor Ms. Schumacher signed the final proposal, which stated that it was "predicated on her executing the

[87] The position was not available at the time it was offered to Ms. Waldon. (Tr. 571). In the "training position," Ms. Waldon would no longer be involved with refunds or the interest calculation problem. However, Ms. Schumacher testified that "[n]o one in the division is involved in refunds." (Tr. 1479).

[88] Ms. Schumacher believed Ms. Waldon resigned as of November 5, 2003, although she testified at her deposition that she chose not to accept Ms. Waldon's resignation. (Tr. 572-573).

separation agreement and general release." (Tr. 576). Nonetheless, Ms. Schumacher believed an agreement existed with Ms. Waldon and believed Respondent complied with its part of the agreement.[89] (Tr. 576; 1444, 1503-1504).

Ms. Schumacher testified that Ms. Waldon would not return her phone calls or e-mails to discuss whether the separation agreement was satisfactory. (Tr. 577). Ms. Waldon, through her attorney, contacted Respondent in February or March 2004 and requested payment of her lease expenses and the pro rata share of her 2004 bonus as outlined in the separation agreement. (Tr. 1445).

Respondent's pay sheet reflects that Ms. Waldon was "terminated." A letter from the HR department dated April 12, 2004, stated that Ms. Waldon's employment ceased as a result of "downsizing." (Tr. 1483-1484; CX-81; CX-82). Ms. Waldon's Human Resource Action form indicates that she was terminated by a "reduction in force," rather than through her own resignation. (Tr. 1483; CX-80). Ms. Schumacher testified that Ms. Waldon was added to the reduction in force on November 26, 2003. (Tr. 1423; RX-20). Ms. Schumacher testified that Ms. Waldon would still be employed if she had not brought up the termination issue. Ms. Waldon would not have received any of her "demands" if she had resigned and left the company two weeks after November 5, 2003. (Tr. 1447). Ms. Schumacher testified that Ms. Waldon received all the benefits of an employee who was included in the RIF because "she stayed beyond a two-week period." (Tr. 1486). Ms. Schumacher testified that Ms. Waldon would still be employed as the Director of Administration at the time of formal hearing; the "training position" that she discussed with Ms. Waldon had not yet been established. (Tr. 1450).

Ms. Schumacher and Mr. Sprick met with the QA representatives to tell them their jobs had been eliminated.[90] (Tr. 580, 1472-1473). While Ms. Schumacher offered Ms. Waldon a future training position, she did not offer any position to Ms. Allen. Ms. Schumacher did not review Ms. Allen's file to

[89] Ms. Schumacher testified that there were two different agreements with Ms. Waldon: (1) a retention agreement that she would work through January 31, 2004; and (2) a severance agreement. Ms. Schumacher believed they reached an agreement in terms of retention in that Ms. Waldon would work through January 31, 2004, but did not reach an agreement on the severance aspect. (Tr. 1446-1447).

[90] The QA representatives were Ms. Allen, Ms. Breaux, and Mr. DoCampo. Mr. Koester, in the Western Division, was not terminated during the RIF. (Tr. 578).

determine if she would be qualified for the training position. (Tr. 580).

Kathy Lamkin

Ms. Lamkin has been employed by Respondent as the company Human Resources (HR) director since January 2004. Prior to January 2004, Ms. Lamkin was employed as the HR Director for the Corporate Division. As the company HR Director, Ms. Lamkin manages human resources programs and processes. The HR department also handles recruiting, compensation and benefits, employee relations, and labor relations. (Tr. 1037). She has worked in the HR field for approximately 20 years. (Tr. 1038).

According to Respondent's job posting procedure, the hiring manager contacts an HR representative when a position becomes available. The position is posted on Respondent's intranet system (CNET) and is posted in each division through other field distribution methods, i.e., an e-mail or physical posting on bulletin boards. (Tr. 1038; RX-6). All employees are eligible to post for available jobs. Exceptions to the posting policy occur for part-time and temporary positions, as well as for frequently available positions such as sales counselors and cemetery personnel. When there is a departmental restructure or reallocation of resources within a department, the positions can be filled from within the department without offering the positions to outside individuals. For the latter exception, the department manager must consult with an HR representative to ensure the position falls within the posting exception. (Tr. 1038-1040).

In October 2003, Mr. Sprick informed Ms. Lamkin that Respondent was implementing a RIF as part of a "company-wide reorganization." (Tr. 1041-1042). In connection with the RIF, a Manager's Resource Guide was created. (RX-8). The Manager's Resource Guide contained a section entitled "Selection Process" which provided the managers with "information about the selection process and [gave] them the information upon which to communicate to employees who would ask these questions." The guide was not a "procedure about how it was done," but was a "communication guide" for the managers. (Tr. 1043).

According to the "Selection Process," there were circumstances by which employees were involved in the RIF. Under one circumstance an "entire function" may be eliminated. In such an instance, everyone who held a position was terminated, so there was no need to select certain individuals for retention. (Tr. 1044). In other circumstances, the job function would remain but the number of individuals in the position was reduced. If five positions were reduced to three positions, then a selection criteria was used to identify which of the five individuals would remain. The selection criteria included tenure, relevant education, experience, and performance measures. (Tr. 1044). The HR directors were involved in helping the managers make their determinations on the above mentioned criteria. (Tr. 1074). The Managers' Resource Guide was intended for communication purposes and did not require documentation of how the selection criteria was evaluated and used. (Tr. 1045).

The selection process occurred before the Manager's Resource Guide was published. The division presidents determined which "functions" would be eliminated in their divisions. The frontline managers were not involved in the selection process. (Tr. 1073-1075). Ms. Lamkin was not aware of any document that directed the division presidents on how to decide which "functions" to eliminate: "The division presidents were given the directive to reduce costs in their division by budgets and by headcount . . . ." (Tr. 1076).

The Manager's Resource Guide recommended procedures for notifying affected employees about the RIF. Ms. Lamkin testified that the goal was "for each affected employee to meet face to face with hopefully their direct manager . . . and an HR rep who could walk through a toolkit with them, explain the benefits, explain what was happening, and just give some comfort and respond to questions that might be available." (Tr. 1046). Ms. Lamkin further testified that the face to face meetings could not logistically happen in every case because the RIF involved 300 employees in four time zones. Consequently, every affected employee was not able to meet face to face with a manager or HR representative. (Tr. 1046-1047). In some cases, groups of employees met together with managers because Ms. Lamkin felt it was important for employees to hear of the RIF from the managers and HR representatives before they heard of it from other employees. (Tr. 1048). Ms. Lamkin testified that it would have been appropriate for Ms. Breaux to learn of the RIF with Mr. Tullier, her manager, on the telephone and with an HR representative physically present. (Tr. 1079).

An "employee toolkit" was provided to each employee affected by the RIF. (Tr. 1053; RX-2). The toolkit contained a set of "Q & A" that addressed benefits, vacation payout, and other routine separation questions. All terminated employees were offered a severance plan that allowed for separation pay, a three month waiver of health premium, and the COBRA premium. Regardless of whether or not the employee signed the severance plan, the employee was offered outplacement services and received a thirty-day extension on access to the employee assistance program. In addition, the affected employees were entitled to thirty days of separation pay. (Tr. 1054-1057). Each toolkit also contained a reference letter specific to each employee. (Tr. 1057-1058). A job-line was set up to allow access to information about available job opportunities with Respondent. All terminated employees were encouraged to apply for available positions. (Tr. 1058-1059).

To Ms. Lamkin's knowledge, the RIF was driven by a restructuring of the company in order to reduce costs. The overall goal was to reduce costs throughout the company, not simply to reduce costs by a reduction in salaries, but other costs such as travel, cell phones, and other purchases. (Tr. 1088-1091). The RIF affected approximately 300 employees at all levels from "hourly employees up to executives." In addition to the RIF, the corporate reorganization required some retained employees to take reductions in pay or to relocate. It also included the elimination of the "COO" level of management. (Tr. 1059-1060).

Despite the elimination of 300 employees, additional jobs remained available. Ms. Lamkin testified that the "company-wide restructure" required a reduction in force, but Respondent did not want to "deter from dealing with our families." Thus it was important to retain the employees in the funeral homes and cemeteries. However, there was "overlap" in the administrative procedures and managerial responsibilities where Respondent felt it could become more efficient. Consequently, as positions in the funeral homes and cemeteries became vacant, it was important that those positions were refilled. However, before filling the vacant positions, the division president reviewed the position to determine if it could also be eliminated and if not approve its posting. (Tr. 1060-1061).

Ms. Lamkin testified that Ms. Allen and Ms. Breaux did not apply for any positions with Respondent after the RIF. (Tr. 1062-1063). She testified that, in addition to Ms. Waldon, six other Directors of Administration were included in the RIF. (Tr. 1063).

Ms. Lamkin worked with Ms. Smith on the appropriate action in the disciplinary proceeding involving Ms. Allen in October

2002. Ms. Lamkin was not present when Ms. Allen signed the write-up documentation. Although Ms. Allen informed Ms. Lamkin that she wanted to respond to the proceedings, Ms. Lamkin was not contacted or provided with follow-up documentation. A rebuttal would have been attached to the write-up and included in Ms. Allen's personnel file. (Tr. 1065-1067).

Ms. Lamkin testified that if an employee asks for the placement of documentation in her personnel file, the document is usually placed in the file. However, the documentation is first evaluated to make sure it is appropriate for the personnel file.[91] However, Ms. Lamkin stated that a response to a disciplinary action form would be attached to the form and placed in the personnel file. (Tr. 1068-1069). The personnel file only requires documentation of a written warning or a final warning, therefore a verbal warning does not necessitate documentation. (Tr. 1070).

In late 2003, Ms. Waldon expressed concern "that action was being taken against her" as a result of a conversation she had with Ms. Lamkin in March 2003.[92] Ms. Waldon reported that she had "issues" with Ms. Smith and Ms. Beatty, which included being ignored and increased contract errors. (Tr. 1083-1084). Ms. Lamkin suggested Ms. Waldon bring the matter to Mr. Crane's attention. Ms. Waldon indicated that she was uncomfortable addressing the matter with Mr. Crane because she believed Mr. Crane disliked her since it took three months to get an office, there was a delay in providing her a company car, and she did not feel Mr. Crane "welcomed" her into the position of Director of Administration. (Tr. 1084-1085). Ms. Lamkin suggested that Ms. Waldon express her concerns to Mr. Crane and asked her to speak with Andrea Westmoreland, the HR director for Ms. Waldon's division. (Tr. 1085). After Ms. Lamkin advised Ms. Westmoreland of the situation, Ms. Lamkin took no further action on the matter. (Tr. 1086-1087).

[91] Ms. Lamkin stated "there are investigations that we're 'illegally prevented' from putting in the personnel file, so, typically if an employee asks we would put it in their file." (Tr. 1068).

[92] The earlier conversation regarded an investigation about a former employee who alleged gender discrimination by a senior manager. Ms. Waldon did not indicate that she believed the retaliation was related to interest calculations or complaints about refunds. Ms. Waldon stated she did not believe she was being discriminated against. (Tr. 1094-1095.)

James McLennan

Mr. McLennan testified that he has an accounting degree from the University of Maryland. At the time of hearing, he had been employed by Respondent for 19 years and had been the Vice-President of Shared Services since its creation in 1996. (Tr. 943).

The purpose of the Shared Services Center (SSC) was to centralize and standardize Respondent's accounting and administrative functions to New Orleans within four separate divisions, four accounting departments, four AS/400s, and four accounting systems. (Tr. 944). The QA representative positions were created so each division would have a representative at the SSC to turn to with its problems. (Tr. 946). Initially, Mr. McLennan supervised the QA representatives. In April 2001, the QA representatives began reporting to Ms. Smith because Mr. McLennan had too many "direct reports." He felt Ms. Smith was best suited to work with the QA representatives because the QA representatives investigated contract errors coming from the field and Ms. Smith's team processed the error rates. (Tr. 947-948).

Sometime before Ms. Allen became a QA representative in March 2001, Mr. McLennan approached the division presidents about eliminating the QA position since two of the four QA representatives had left Stewart's employment. The division presidents decided to retain the position. (Tr. 948-949). In November 2002, the divisional CFOs began to supervise the QA representatives. The CFOs hoped to make the positions more effective by having the QA representatives report through the division, rather than through the SSC. The CFOs hoped to eliminated the "we-they" attitude. (Tr. 950-951).

In October 2000 or November 2000, Mr. McLennan became aware of an interest calculation problem with the AS/400 computer. While a team worked with the IS department to find and fix the "computer aspect" of the problem, Ms. Beatty and Special Projects began manually reviewing the accounts. (Tr. 952-953). Mr. McLennan testified that the AS/400 incorrectly calculates interest when there is a "material prepayment" of a large amount. Thus, the interest calculation would not be affected by a prepayment of two dollars on the day before payment is due. However, a thousand dollar prepayment would "alter the schedule." (Tr. 1011).

Mr. McLennan wrote the January 15, 2003 e-mail to notify the "field" that screen changes would occur with the implementation of the new program. Mr. McLennan wanted to know if the screen changes would affect their work. (Tr. 1002; CX-51). He did not know which screen was used to quote payoffs in the field. Prior to the January 15, 2003 e-mail, Mr. McLennan did not personally inform the RMCs that the AS/400 incorrectly quoted payoffs. The issue was discussed during a CFO meeting on November 1, 2001. Consequently, the CFOs were aware of the problem. The "chain of command" placed the RMCs under the supervision of the CFOs who "should have been managing that." (Tr. 1004-1005, 1025). Mr. McLennan also testified that it was not necessary to advise the RMCs to stop using the AS/400 because the AS/400 quotes were "right most of the time." In 2001, Mr. McLennan was focused on outstanding credit balances, which he believed was an "overwhelming problem." (Tr. 1006).

The interest calculation problem was not a secret. The "strategic plan" for fiscal year 2002 included fixing the payment application program to resolve the interest problem. The interest calculation problem did not appear on the "strategic plan" for fiscal year 2001 because the goals for fiscal year 2001 had already been developed at the time the interest problem was discovered.[93] (Tr. 979-980). The "strategic plan" for fiscal year 2003 did not address the interest calculation problem because it was thought to be fixed. (Tr. 982). The new program was not implemented in 2003 because it ultimately did not work "correctly." (Tr. 983).

In January 2003, Mr. McLennan approached the senior executives about a concern he had with refunds. Mr. McLennan testified that the senior executives did not understand the volume of refunds that were processed, which he estimated to be over a million dollars each month. Mr. McLennan provided the senior executives with a "statistical detail" of the refunds. The senior executives authorized Special Projects to review all refunds beginning in March 2003. (Tr. 954-955).

Special Projects posted an Intranet log of all refunds for other employees to check the status of any refund. Special Projects was not trying to hide the timing of refunds. Initially, the log had problems, showing that some refunds had not been processed, when in fact the refunds had been processed. (Tr. 964-965). Mr. McLennan testified that refund delays were

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[93] Mr. McLennan testified that they worked to fix the interest calculation problem during fiscal year 2001, even though it was not specifically listed as a goal. (Tr. 980-981).

not always due to problems within Special Projects. He described the refund process as an "assembly line" where the refund could be held up at a step prior to its submission to Special Projects. (Tr. 967).

Mr. McLennan first became aware of the RIF in summer 2003. Mr. McLennan and Mr. Hymel were asked by Ken Budde, then CFO, to recommend areas where "administrative and direct funeral costs" could be reduced. He was not involved in the decision to include the QA representatives in the RIF and did not know of their inclusion in the RIF until after the fact. (Tr. 968-969, 973). He testified that the RIF process was "all very secret." Mr. McLennan recommended "conceptual changes;" he recommended the elimination of redundant "functions" and did not attach specific names to his plan. (Tr. 974). Based on each division's "structuring needs," the division presidents made the ultimate decision about who to include in the RIF. (Tr. 1020). He did not believe the document he prepared was used in the decision to eliminate the QA representative because the QA representatives were not part of his analysis. (Tr. 988).

Mr. McLennan has not seen a full list of the employees affected by the RIF. He eliminated ten employees within his group on December 3, 2003. Since then, he has added ten new employees and may hire more employees if needed. (Tr. 1014). He affirmed that one of the goals of the RIF was to "consolidate" some field functions into the SSC. As a result, one additional employee in the SSC may have replaced ten field employees by performing their functions. (Tr. 1029). The additional positions in the SSC were posted. Ms. Allen did not post for any open positions. Mr. McLennan did not speak to the HR department about offering positions to any employees without following the posting procedure. (Tr. 1015).

Mr. McLennan recalled reviewing an e-mail from Virginia Williams in which Ms. Williams stated that refunds were processed within four to six weeks. He felt the e-mail "misrepresented the facts," so he contacted Ms. Williams. Mr. McLennan advised Ms. Williams that the "goal" was to have refunds issued within 24 hours. He advised her to be careful about what she writes in e-mails because they get forwarded "all over the place."[94] Mr. McLennan testified that he did not threaten Ms. Williams and was "really just trying to coach her."

[94] By the time Mr. McLennan saw the e-mail, it had been forwarded to several people and some recipients had already begun questioning the four to six week time frame. Mr. McLennan stated that "[s]he was creating a lot of negative goodwill with that e-mail." (Tr. 961-962).

(Tr. 958-959). Although he went outside the "chain of command," he was not trying to intimidate Ms. Williams. (Tr. 994-995).

Ms. Schumacher spoke to Mr. McLennan about his discussion with Ms. Williams. He testified that Respondent maintains a goal of issuing refunds within 24 hours, but admitted that some refunds take four to six weeks or longer or are never issued. (Tr. 962-964). He testified that measures have been taken to "streamline" the refund process. However, some refunds require additional time to compile the correct paperwork, while other refund requests are simply not appropriate. (Tr. 963-964).

Mr. McLennan maintained an "open door policy" and did not "stonewall" anyone. He testified that Ms. Allen, Ms. Breaux, and Mr. DoCampo stopped attending the monthly staff meetings once they began working for the divisional offices. (Tr. 976). Mr. McLennan admitted that he "inadvertently" excluded them from changes in procedures. According to Mr. McLennan, he "would communicate it to [his] organization but the QA reps reported to the division office, it was the division president's job to communicate that through his organization." (Tr. 977).

Mr. McLennan did not attempt to hide anything from the QA representatives, nor did he try to hinder their ability to do their jobs. He did not instruct his team to stop cooperating with the QA representatives. (Tr. 978). Mr. McLennan was not informed that Ms. Kirkpatrick complained about retaliation against her direct reports. (Tr. 993). He testified that many people complained about untimely refunds in Special Projects, although he could not recall a specific complaint from Ms. Allen or Ms. Breaux. However, Ms. Waldon raised issues about untimely refunds. (Tr. 978).

Lenora Smith

Ms. Smith testified at formal hearing. Ms. Smith is not an accountant, nor does she have a degree. (Tr. 796-797). She has been employed by Respondent for approximately 16 years. In April 1998 she became the Team Leader for Contract Services. From 1999 until 2004, Special Projects reported to Ms. Smith.

Special Projects handled the payment application issue that arose in 2000. Special Projects examined accounts for the payment application problem, reviewed payment histories, and determined whether or not refunds should be issued. (Tr. 758-759). Ms. Smith is part of the "team" that has worked to fix the payment application problem because her employees had knowledge of the accounts and the transactions. Further, Ms. Smith was able to provide an "overall view" of the situation because she had worked at the "outside locations." (Tr. 759-760).

Ms. Smith supervised Ms. Allen in "contract processing" and gave Ms. Allen good work evaluations. When Ms. Allen became a QA representative, Ms. Smith acted as her supervisor beginning in April 2001. (Tr. 760). From March 2001 to November 2002, she supervised all QA representatives including Ms. Breaux and Mr. DoCampo. (Tr. 761).

On October 28, 2002, Ms. Smith documented a situation regarding Ms. Allen's use of the company credit card. (RX-5). The write-up involved three separate incidents which Ms. Smith spoke to her about on the date of the write-up. (Tr. 774; RX-5). Ms. Smith first discussed use of the company credit card after "inappropriate charges" were made to a grocery store and a women's clothing store in June 1998. Ms. Allen attributed the charges to "an honest mistake." (Tr. 777-778). The offense was not previously documented. (Tr. 788). In September 2002, Ms. Smith was informed that Ms. Allen used the credit card to "reserve a room." Ms. Smith decided to take "some different action" because Ms. Allen's mistaken use of the credit card had to stop. All three incidents of credit card use were then written-up to convey the seriousness of the violation. (Tr. 779). Although violation of the credit card policy was a terminable offense, Ms. Smith did not include the offense in Ms. Allen's 2002 performance review. (RX-33).

Ms. Smith testified that she discussed the situation with Ms. Lamkin from Human Resources. As a result of that conversation, Ms. Smith decided to give Ms. Allen a written warning, since no prior written warnings had been given. Ms. Smith believed that the written warning would put Ms. Allen on notice that the credit card usage would not be tolerated again. (Tr. 809).

Ms. Allen disagreed with Ms. Smith and refused to sign the write-up. Ms. Allen did not dispute that the incidents occurred, but indicated that she wanted to add additional information. Ms. Smith suggested she write a rebuttal. Ms. Smith testified that she has no knowledge of Ms. Allen actually writing a rebuttal. Ms. Smith approached Ms. Allen a few weeks later and Ms. Allen signed the write-up on November 13, 2002. (Tr. 780-782). Ms. Smith has no knowledge of Ms. Allen adding anything to the file. (Tr. 782).

Ms. Allen continued to work for Ms. Smith after November 1, 2002, but was transferred to Ms. Kirkpatrick's supervision retroactively to November 1, 2002. (Tr. 786). Ms. Smith did not discuss Ms. Allen's credit card use with Ms. Kirkpatrick. She never looked into Ms. Allen's file to see if the "rebuttal" documentation was submitted. (Tr. 786-787).

In March 2003, Special Projects began reviewing all refunds which increased its workload "tremendously." Special Projects increased its staff over time, but there was an initial delay in the processing of refunds. (Tr. 772-773). Complainants approached Ms. Smith about the untimely refunds.[95] (Tr. 795).

The error rate for the Central Division increased from 3.9 in January 2003 to 11.7 in June 2004, with some fluctuation during that time. (Tr. 765). In March 2003, the error rate for the Central Division increased one point. (Tr. 789). Ms. Smith testified that Ms. Allen complained to her about untimely refunds sometime after March 2003, but could not state exactly when the complaint was made.[96] (Tr. 790). Ms. Smith attributed the error rate increase to changes in the groups in charge of quality assurance. (Tr. 765-767). The Central Division has always had the most errors of the four divisions. Ms. Smith noted that the Central Division is "very large, it doesn't have some of the infrastructure some of the other divisions has, and there's been some turnover." (Tr. 768).

None of the employees in Special Projects were terminated during the December 3, 2003 reduction in force. Ms. Smith testified that the RMCs were not terminated during the RIF. Ms. Smith did not know what Ms. Waldon was told concerning her position, but explained that the Central Division had at least three RMCs. (Tr. 795).

Ms. Smith could not recall exactly when Ms. Allen raised complaints about the dispute process and disputed accounts in

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[95] Ms. Smith testified that many people complained about the untimely refunds after March 2003. The complaints were not limited to Complainants. (Tr. 803-804).

[96] Before the October 28, 2002 meeting, Ms. Allen "probably had not complained about the timeliness of refunds." However, Ms. Allen would present complaints to Ms. Smith any time there was a problem. Ms. Smith does not remember having a discussion with her about payment application, but at some point Ms. Allen complained that refunds were taking too long. Ms. Smith testified that the timeliness complaints must have occurred after Special Projects took over refunds in March 2003. (Tr. 812).

about 2001-2002. (Tr. 813-814). Ms. Smith and Ms. Waldon discussed the payment application issue, but Ms. Smith did not recall having a similar conversation with Ms. Allen or Ms. Breaux. (Tr. 795-796). The interest calculation problem was not a secret within the company and Ms. Smith was never advised to keep it a secret. Further, Ms. Smith never advised others to keep it a secret. (Tr. 783).

Ms. Smith testified she did not retaliate against Ms. Breaux because she was friends with Catherine Lenihan. She testified that she did not retaliate against Complainants for any reason. (Tr. 771). Further, she did not retaliate against any employee and was aware that retaliation violates company policy. (Tr. 771).

Ms. Smith testified that she did not feel tension between herself and the QA representatives. She believed she was helpful when they sought her assistance and never "turned them away." Ms. Smith never intentionally excluded them from e-mails, process changes, or meetings. She testified that she did not ever try to stonewall the QA representatives or Ms. Waldon. She believed she had a good relationship with Ms. Waldon and all employees. (Tr. 770-771).

Ms. Smith's team changed workspaces three times during her employment with Stewart. Her team's cubicles were reduced from eight by eight cubes to six by eight cubes on the second to last move and have remained at the smaller size in subsequent moves. (Tr. 769).

Patricia Beatty

Ms. Beatty has a degree in accounting, but is not a licensed CPA. She began working for Stewart in 1996. In July 1999 she began working on the Special Projects Team (Special Projects), which was later renamed Business Support Services. (Tr. 861-862). Her current title is the Business Support Services Team Leader. (Tr. 588).

In October 2000, Ms. Beatty became aware that the AS/400 computer could not properly compute interest on accounts when the customer made a prepayment on his principle amount. On prepaid accounts, the AS/400 generated incorrect payoff amounts which were then quoted to customers. (Tr. 863). If the payoff quote was overstated, Ms. Beatty's team was responsible for issuing a refund to the customer. If the payoff quote was understated, Special Projects would adjust the account and write off the balance. (Tr. 591-592).

While Stewart worked to correct the AS/400 problem, internal controls were implemented to monitor the system. Internal audit provided Ms. Beatty with an amortization table and she began calculating the refunds due back to customers in November 2000.[97] (Tr. 593). Ms. Beatty did not amortize every account between November 2000 and 2003 to determine whether or not the AS/400 was accurate. As of March 2003, Ms. Beatty's team would review refunds for prepayment when the refund was based on a credit balance. If the account showed a prepayment, her team would perform calculations to determine whether or not the payoff amount was correct. (Tr. 920-921). Amortizations were performed only on accounts that showed prepayment. (Tr. 931).

The amortization schedule that was used on prepaid accounts was a simple calculation and could have been applied to any account. (Tr. 598). The amortization schedule was standardized, but the data that was entered could be changed. (Tr. 631-632). The procedures for amortization were "internal procedures within the group" and were not shared with the field. (Tr. 605; CX-1). However, Ms. Beatty did share the actual amortization schedule with anyone who requested it. (Tr. 606). She testified that the schedule was distributed "a little at a time" because some employees were not accountants. It was distributed to all RMC directors and Ms. Waldon received a copy in June or July 2003. (Tr. 624-625, 880-881).

On December 4, 2003, Special Projects began doing the payoffs. (Tr. 607). Prior to this time, "in 2000 and 2003," payoffs were quoted by someone from customer service in the field, using the AS/400. (Tr. 609). The Customer Refund and Credit Balance Policy and Procedures became effective December 31, 2003.[98] (Tr. 611; CX-2). It was published as part of the

[97] The AS/400 was in use before Ms. Beatty began working for Stewart in 1996. However, no one has gone back as far as 1996 to refund those customers whose accounts showed a credit balance. Ms. Beatty testified that the average refund was between $10.00 and $300.00; "because of the small numbers we just didn't go backwards." (Tr. 598-600).

[98] The Customer Refund and Credit Policy had nothing to do with payoffs. (Tr. 612). Examples were attached to the Customer Refund and Credit Balance Policy and Procedures. (CX-2, pp. 5-40). Included in the examples were checks dated between approximately two months and four months after the December 31, 2003 effective date of the policy and procedures. Ms. Beatty testified more recent examples were added to the policy and procedures after it was issued. (Tr. 619-620). She testified that there were several

Blue Book Procedures and was accessible by everyone in the field. (Tr. 611-612).

Ms. Beatty testified that the policy regarding refunds for credit balances and overpayments was "almost the same" prior to December 31, 2003. Before December 31, 2003, the procedure to issue a refund related to payment applications involved Special Projects receiving a credit balance and issuing the refund. (Tr. 614). Prior to December 2003, the RMC handled accounts where a customer had a credit balance/overpayment. Special Projects internally handled those accounts with credit balances on the payment application. (Tr. 615).

Ms. Beatty was on the team that worked to resolve the AS/400 interest calculation problem. (Tr. 620). Ms. Beatty could not recall Ms. Waldon asking about customer payoffs or credit balances. (Tr. 623-624). According to Ms. Beatty, the programming team did not discuss keeping the problem a secret. Ms. Beatty testified that she never told anyone the problem was a secret. (Tr. 865-866).

Ms. Beatty had a conversation with Ms. Apolinar regarding a change in the amount of a refund she had requested. Special Projects amortized a refund request that Ms. Apolinar submitted on a prepaid account and found that the customer was due a refund amount higher than the amount requested. Ms. Apolinar contacted Ms. Beatty to clarify the reason for the increased refund amount and questioned how to explain the refund discrepancy to the customer. Ms. Beatty did not use the phrase "hush-hush," but indicated that she would not attempt to explain the amortization schedule to a customer. (Tr. 868-870). Ms. Apolinar has not raised the "hush-hush" comment in later conversations with Ms. Beatty. (Tr. 871). Subsequently, Ms. Schumacher asked Ms. Beatty about the "hush-hush" comment and her conversation with Ms. Apolinar. Ms. Beatty conveyed the same information to Ms. Schumacher that she testified to at the hearing. (Tr. 871-872). Ms. Beatty testified her conversation with Ms. Apolinar occurred in 2003, approximately three years after she learned of the AS/400 problem. Ms. Beatty did not believe the problem was a secret and she did not tell Ms. Apolinar that it was a secret. (Tr. 873).

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versions of the Customer Refund and Credit Balance Policy and Procedures, therefore she could not remember everything that was attached. Nonetheless, she testified that the contents of CX-2 accurately depicts the policy as it was made available on December 31, 2003, and suggested that the examples were added at a later date. (Tr. 620).

Ms. Beatty does not recall receiving complaints from Ms. Allen or Ms. Breaux regarding any issues with refunds. (Tr. 877). Special Projects created an Intranet log of all incoming requests that could be used by any employee to track the progress of a refund. (Tr. 878-879).

Ms. Beatty discussed problems with POS in a meeting with Ms. Allen, Ms. Breaux, and Ms. Kullman. At the time a customer presents an insurance policy, he must sign an "assignment form" which specifically states that the purchaser is responsible for the account if the other source does not pay. (Tr. 884). Ms. Beatty is not aware of any situation where an account was written off because the "other source" refused to pay and the customer's statement showed a zero balance. (Tr. 886). In such an instance, the balance is classified as a "bad debt expense" and is sent to a third-party collection agency. Once the collection agency recovers the balance, it is remitted back to the company as a "recovery."[99] (Tr. 887).

Ms. Allen and Ms. Breaux decided that they wanted to handle the POS issue with the CFOs. Ms. Beatty advised that they include Mr. Boynton in the discussions. Ms. Beatty believed that Ms. Allen and Ms. Breaux had raised a customer service issue and Mr. Boynton was in charge of customer service. (Tr. 888-889).

Ms. Beatty's department took over the payoff duties in December 2003 as part of Respondent's restructuring and centralizing functions. (Tr. 901, 923-924). Ms. Beatty did not increase her staff until after the RIF. At the time of the RIF, Ms. Beatty was aware that her department would increase its duties, but she did not know how much extra work was entailed or how much extra help was needed. (Tr. 927). Ms. Allen and Ms. Breaux were not offered positions assisting Ms. Beatty with the payoff duties. Human Resources decided that the open positions should be posted in accordance with Stewart's posting policy. (Tr. 924). Ms. Allen and Ms. Breaux did not express a desire to

[99] Mr. Boynton decided if an account should be turned over to a "third party." Mr. Boynton would refer the account to Ms. Beatty and provide specific reasons for the write off. Ms. Beatty testified that the company had controls in place to make sure the write off was legitimate. Ms. Beatty would actually performed the write off and send the matter back to Mr. Boynton who works with the third party to collect the owed balance. (Tr. 933-935).

work in Special Projects, nor did they ever post for the open positions within the department. (Tr. 937).

Laurie Kullman

Ms. Kullman testified that she has been employed by Respondent since 1995. She is the accounts receivable manager in the Information Systems department (IS). (Tr. 815). She has eight employees and reports to Sim Diano, the Director of Development. (Tr. 816).

In October 2000, Ms. Kullman first became aware of the payment application problem on the AS/400 computer when Ms. Schumacher called a meeting during which the interest calculation issue was discussed. (Tr. 817-818). At the meeting, no one suggested that the interest calculation problem should be a secret and Internal Audit did not tell anyone that the problem should not be discussed within the company. Internal Audit considered the problem "high priority" and notified representatives within the company that the problem needed to be fixed. (Tr. 818-819).

Ms. Kullman has been involved with fixing the AS/400 problem since the end of 2000. She testified that either she or someone from her team has been working on a solution "full-time" since the meeting. She estimated that between 50% and 100% of her time has been devoted to the project, "depending on where we were in the process." (Tr. 820). Ms. Kullman testified that Stewart uses a "complicated" system and that many considerations must be taken into account when fixing the program. She has not been instructed to delay her work in resolving the programming issue and it has remained a priority of both Ms. Kullman and Respondent. (Tr. 821).

Once a program is developed, it goes through "QC testing" where an IS group verifies that the program meets all requirements and determines if anything "fell through the cracks." Ms. Kullman testified that on a large project, a program will go through several "QC cycles." Once the program passes QC testing, the program undergoes "user testing." (Tr. 821-822). During user testing, experts in the field test the program to ensure that it meets their needs. (Tr. 823).

Ms. Kullman does not believe the payment application program underwent testing more than once. She testified that the program had "gotten really close, or what we thought as close, and hit a roadblock because of a lot of the converted data that we had out there." (Tr. 823). The team identified too many problems and regrouped to devise a better solution. (Tr. 823).

Ms. Kullman received an e-mail from Mr. McLennan dated January 15, 2003. (Tr. 824). According to the e-mail, the programming work was completed and tested, but the "802 screen" required modification. (CX-51). Ultimately, the program was not implemented because "[t]here were just too many scenarios that weren't being handled" and the reprogramming efforts had to "go back to square one." (Tr. 824). In May 2003, Ms. Kullman began to realize the new program would not work because they "were discovering that because of these data issues and some of the stuff that just wasn't meshing out right that this wasn't good." (Tr. 848; CX-17). As to the status of the reprogramming efforts at the time of the formal hearing, Ms. Kullman testified as follows:

> [b]asically payoff and cash are in QC. The payoff modules were released for user testing and have for the most part passed user testing, so we're good on payoff. Cash is in its final phases of QC testing and I expect it to be in the users hands either by the end of this week or next. (Tr. 825).

She expected the new program would be implemented in the weeks following the formal hearing, but based that expectation on the assumption that the program passed user testing and that no new issues arose. (Tr. 825). Ms. Kullman does not believe there is a "simple fix" to the programming problem. She agreed that a "ripple affect [sic]" could be caused by making changes within the program which could have an effect on other areas of the computer. (Tr. 826).

Ms. Kullman met with Ms. Allen, Ms. Breaux, and Mr. Docampo regarding an issue related to POS. She testified that the meeting could have regarded "either the maintenance program for pending other sources and the statements and how they were being affected by that because that was an issue for sometime." (Tr. 831). Subsequently, Ms. Kullman met with Ms. Allen, Ms. Breaux, and Ms. Beatty. Ms. Kullman later accompanied them to a meeting with the CFOs. She testified that the presented issues were left in the hands of the CFOs and that no action item ever came out of the POS issue. (Tr. 834-836).

Ms. Kullman testified that the customer is ultimately responsible for the amount due on a contract based on the agreement signed upfront. (Tr. 838). She believed that one of the issues raised by Ms. Allen and Ms. Breaux concerned "splits." (Tr. 841). If $200.00 is due from the customer and $800.00 is due from pending other sources, the customer has a total balance of $1,000.00. (Tr. 840). Ms. Kullman and Mr. Tullier were working on a solution to the "split" issue. (Tr. 841).

On cross-examination, Ms. Kullman testified that another issue was that the POS was being deleted. When the POS was deleted, the customer statement showed that zero money was due. (Tr. 842-843). Since nothing on the statement indicated to the customer that the insurance company did not pay, the customer received a bill indicating that he did not owe anything. Ms. Kullman testified that she corrected this aspect of the program in October 2003. (Tr. 843-844). Ms. Beatty user-tested the change in the program. (Tr. 844).

Ms. Beatty was not rude during the meeting with Ms. Kullman, Ms. Allen, and Ms. Breaux. Ms. Kullman was receptive to suggestions from Ms. Allen and Ms. Breaux. Ms. Kullman was never instructed that she should not meet with them or assist them. (Tr. 853).

Ms. Kullman testified that the computer problem is complicated by the "conversion of a conversion" of data. (Tr. 849). The existing problem would not be solved by purchasing a new system. If Respondent's existing data was put into a new system, the same problems would continue to occur. (Tr. 855-856).

Pedro DoCampo

At the time of formal hearing, Mr. DoCampo had been employed by Respondent for eleven years. He was included in the RIF on December 3, 2003. Since January 2004, he has held the position of Corporate Training Consultant. (Tr. 1103).

Mr. DoCampo was a QA representative for the Southern Division from 1998 to 2003. (Tr. 1103, 1105). Mr. McLennan hired him into the position. As a QA representative, Mr. DoCampo reported first to Ms. Smith and then to Tom Friou, the CFO for the Southern Division. (Tr. 1105). Mr. DoCampo testified that each QA representative serviced a different division. While the QA representative for the Western Division was initially located in New Orleans, the position was relocated to California when Mike Koester was hired into the job. Mr.

DoCampo testified that he was not familiar with Mr. Koester's day-to-day duties, but that Mr. Koester was also the "CAFE Administrator" and did not perform the same functions as the QA representatives in New Orleans. (Tr. 1106-1108).

Mr. DoCampo changed workspaces four or five times during his tenure as a QA representative. The QA representatives had cubicles in close proximity to each other and always moved together as a group. (Tr. 1108-1109). Mr. DoCampo found that he had adequate workspace with every relocation, including the relocation just before the RIF. He testified that the lack of an "overhang" for his binders and the inability to lock his drawers were not "problematic." (Tr. 1109). He also testified that he had adequate filing cabinet space. Mr. DoCampo estimated that his workspace was about the same size as Ms. Breaux's workspace. He testified that Ms. Breaux complained about the storage area located next to her cubicle, but never complained about it interfering with her ability to work. Mr. DoCampo felt the lighting was adequate in his workspace and did not remember Ms. Breaux complaining about the lighting. (Tr. 1110-1111).

Mr. DoCampo testified that the QA representatives had all the equipment necessary to do their jobs, which included use of a fax machine, a laptop computer, and copies of regulations and administrative procedures. Ms. Allen and Ms. Breaux did not complain to him that the equipment or workspace was inadequate to perform their jobs. (Tr. 1113-1114).

Mr. DoCampo was included in the RIF on December 3, 2003. On the morning of December 3, 2003, Ms. Allen told Mr. DoCampo that she heard a rumor that the QA representatives were likely to be included in the RIF. He does not know from whom Ms. Allen heard the rumor. (Tr. 1114-1115). He was officially informed of the RIF late in the afternoon when he was called to a meeting with Ms. Schumacher and Mr. Sprick, along with Ms. Allen and Ms. Breaux. During the meeting, the QA representatives were told that their jobs were being eliminated. The severance package was explained to them and they were encouraged to use the job hotline. (Tr. 1115-1116). Mr. DoCampo later spoke to Mr. Friou, his supervisor, over the telephone while Mr. Sprick was present. (Tr. 1116).

Mr. DoCampo was encouraged to use the job hotline and apply for another position. He was not told to apply for any specific position. Mr. DoCampo called the hotline and applied for a position in corporate training. After two interviews, he was hired as a Corporate Training Consultant. (Tr. 1118-1119). His job duties as a Corporate Training Consultant differ from his duties as a QA representative. Mr. DoCampo took a decrease in pay of approximately twenty percent. (Tr. 1120).

Mr. DoCampo testified that the QA representatives shared ideas with each other and that he offered ideas and suggestions as well. During the conference in June 2003, he participated in discussions about the payment application and interest calculation problems. (Tr. 1121-1122). The RMC directors asked for the amortization table to manually calculate payoffs themselves. Mr. DoCampo had a copy of the amortization table, but could not distribute it without "approval" from Ms. Beatty in Special Projects. (Tr. 1122-1124). Mr. DoCampo testified that only "management" was given access to the amortization schedule because of a concern for accuracy in the payoffs. (Tr. 1124).

While Special Projects did not "secret" the fact that it was performing manual calculations, Mr. DoCampo felt there was friction and lack of communication between the QA representatives and the SSC. (Tr. 1125). The QA representatives were to "troubleshoot" problems in processing. When the QA representatives found problems at the SSC, the problems were reported to Mr. McLennan and the QA representatives were viewed as "tattletales." (Tr. 1125).

Mr. DoCampo was left out of e-mails, meetings, and policy changes. He complained about untimely refunds "at some points." In the Southern Division, Florida was very strict with its requirements on issuing refunds. Mr. DoCampo testified that he complained to Special Projects that particular "cases" had to be done more quickly. (Tr. 1126). He noted an increase in delays once Special Projects began reviewing all refunds. (Tr. 1127).

Mr. DoCampo participated in approximately three meetings regarding the POS problem. He did not know if he was excluded from any meetings with Ms. Allen, Ms. Breaux, and Ms. Kullman. (Tr. 1127-1128). Mr. DoCampo was present at a meeting where the QA representatives and the CFOs discussed a solution to the POS problem. (Tr. 1138). Mr. DoCampo also testified that the AS/400 could not properly calculate interest on a pre-paid account and that he raised the issue with the CFOs. (Tr. 1138).

Mr. DoCampo played on a tennis team with Mr. Budde in 1991 or 1992 for about four months. Afterwards, they continued to play tennis once a month for a few years. Mr. DoCampo may receive an invitation to Mr. Budde's "open house" on Christmas Day. Mr. Budde did not tell Mr. DoCampo about the RIF, nor did he promise Mr. DoCampo a job after the RIF.[100] (Tr. 1129-1130).

IV. ANALYSIS AND DISCUSSION

A. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my

[100] Mr. Budde recommended Mr. DoCampo for his first job with Respondent. Mr. Budde is the head of the Corporate Division, and Mr. DoCampo works in the Corporate Division as a Corporate Training Consultant. (Tr. 1132).

credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

B. The Statutory Provisions

The whistleblower provision of Sarbanes-Oxley, set forth at 18 U.S.C. §1514A, states, in pertinent part:

> No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee--
>
> > (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by--
> >
> > > (A) a Federal regulatory or law enforcement agency;
> > >
> > > (B) any Member of Congress or any committee of Congress; or
> > >
> > > (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) . . . .

18 U.S.C. § 1514A (a)(1); see also 29 C.F.R. § 1980.102 (a), (b)(1).

The whistleblower provision of Sarbanes-Oxley is similar to whistleblower provisions found in many other federal statutes.

Since the Sarbanes-Oxley Act is relatively new, reference to case authority interpreting other whistleblower statutes is appropriate. See Welch v. Cardinal Bankshares Corporation, Case No. 2003-SOX-15 (ALJ Jan. 28, 2004).

Title 18 U.S.C. § 1514A(b)(2) provides that an action under Section 806 of the Act will be governed by 49 U.S.C. § 42121(b), which is part of Section 519 of the Wendell Ford Aviation Investment and Reform Act for the 21st Century (the AIR 21 Act). See, Platone v. Atlantic Coast Airlines Holdings, Inc., Case No. 2003-SOX-27 (ALJ Apr. 30, 2004).

C. The Burden of Proof

In a Sarbanes-Oxley "whistleblower" case, a complainant must establish by a preponderance of the evidence that: (1) she engaged in protected activity as defined by the Act; (2) her employer was aware of the protected activity; (3) she suffered an adverse employment action, such as discharge; and (4) circumstances exist which are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action. See Macktal v. U. S. Dep't of Labor, 171 F.3d 323, 327 (5th Cir. 1999); Zinn v. Univ. of Missouri, Case No. 1993-ERA-34 (Sec'y Jan. 18, 1996); Overall v. Tennessee Valley Auth., Case No. 1997-ERA-53 @ 12 (ARB Apr. 30, 2001). The foregoing creates an inference of unlawful discrimination. Id. With respect to the nexus requirement, proximity in time is sufficient to raise an inference of causation. Id.; see Welch, supra.

In Marano v. Dept't of Justice, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1), the Court observed:

> The words "a contributing factor" . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.

Marano, 2 F.3d at 1140 (citations omitted); see also, Welch, supra.

If complainant fulfills this burden of proof, Respondent may avoid liability under Sarbanes-Oxley by producing sufficient evidence to clearly and convincingly demonstrate a legitimate purpose or motive for the adverse personnel action. See Yule v. Burns Int'l Security Serv., Case No. 1993-ERA-12 (Sec'y May 24, 1995). Although there is no precise definition of "clear and convincing," the Secretary and the courts recognize that this evidentiary standard is a higher burden than a preponderance of the evidence and less than beyond a reasonable doubt. See Id. @ 4.

The burden shifts to the complainant who must then provide some evidence, direct or circumstantial, to rebut the proffered reasons as a pretext for discrimination.[101] Ultimately, "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown **both** that the reason was **false**, **and** that discrimination was the real reason" for Respondent's decision. Hicks, 509 U.S. at 515 (emphasis added).

1. Did the Complainants engage in Protected Activity under the Sarbanes-Oxley Act?

The legislative history of Sarbanes-Oxley states that the reasonableness test "is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts." Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, Cong. Rec. S7418, S7420 (daily ed. July 26, 2002), 2002 WL 32054527 (citing Passaic Valley, 992 F.2d 474 (3rd Cir. 1993). "The threshold is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence." Id.; see Collins v. Beazer Homes USA, Inc., __ F.Supp.2d __, 2004 WL 2023716 (N.D.Ga. Sept. 2, 2004).

The legislative history of the Act makes it clear that fraud is an integral element of a cause of action under the whistleblower provision. See e.g., S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002) (explaining that the pertinent section

[101] Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by a **prima facie** case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510-511, 113 S.Ct. 2742 (1993). See Carroll v. United States Dep't of Labor, 78 F.3d 352, 356 (8th Cir. 1996) (whether the complainant previously established a **prima facie** case becomes irrelevant once the respondent has produced evidence of a legitimate non-discriminatory reason for the adverse action.)

"would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company"). The provision is designed to protect employees involved "in detecting and stopping actions which they reasonably believe are fraudulent." Id. In the securities area, fraud may include "any means of disseminating false information into the market on which a reasonable investor would rely." Ames Department Stores Inc., Stock Litigation, 991 F.2d 953, 967 (2d Cir. 1993) (addressing SEC antifraud regulations). While fraud under the Act is undoubtedly broader, an element of intentional deceit that would impact shareholders or investors is implicit. See Hopkins v. ATK Tactical Systems, Case No. 2004-SOX-19 (ALJ May 27, 2004); Tuttle v. Johnson Controls, Battery Division, Case No. 2004-SOX-0076 (ALJ Jan. 3, 2005).

Thus, complainant's belief "must be scrutinized under both subjective and objective standards, i.e., [she] must have actually believed that the employer was in violation of [the relevant laws or regulations] and that belief must be reasonable." Melendez v. Exxon Chemicals Americas, Case No. 1993-ERA-6 (ARB July 14, 2000). The reasonableness of a complainant's belief regarding illegality of a respondent's conduct is to be determined on the basis of "the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience." Melendez, supra, (quoting Minard v. Nerco Delamar Co., Case No. 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. @ 7, n.5); see Lerbs v. Buca Di Beppo, Case No. 2004-SOX-8 (ALJ June 15, 2004).

An employment action is unfavorable if it is reasonably likely to deter employees from making protected disclosures. A complainant need not prove termination or suspension from the job, or a reduction in salary or responsibilities. Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000). See also Halloum v. Intel Corp., Case No. 2003-SOX-7 (ALJ March 4, 2004); Daniel v. TIMCO Aviation Servs., Inc, Case No. 2002-AIR-26 (ALJ June 11, 2003).

Complainants allege that they engaged in protected activity by reporting their concerns regarding the following two practices: (1) faulty interest calculations, and (2) inconsistent and untimely refunds. In addition, Ms. Allen and Ms. Breaux allege they engaged in protected activity by reporting their concerns regarding Respondent’s POS system. Finally, Ms. Waldon alleges she engaged in protected activity by expressing complaints regarding trusting merchandise and cost recognition. All such complaints were made internally; arguably to persons with supervisory authority over Complainants or to persons who have authority to investigate, discover or terminate misconduct under 18 U.S.C. § 1514(A)(1)(c).

Respondent contends that Complainants did not engage in protected activity because they "provide[d] information" that was already known by the company. According to Respondent, the Act requires that Complainants actually provide previously unknown information to their employer. I find and conclude that Respondent's argument fails. The Act's protection is not limited only to employees who provide information or cause information to be provided to their employers. Rather, the Act also protects employees who "otherwise assist in an investigation." The legislative history of the Sarbanes-Oxley Act indicates the intent of the Act is to protect employees who, through lawful acts, disclose information or assist in the investigation of acts which they reasonably believe to be fraudulent. S. Rep. 107-146. Neither the Act nor the legislative history alludes to a requirement that the employer have no previous knowledge of the allegedly fraudulent activity. Accordingly, I find and conclude Complainants shall not be denied protection simply because they reported information of which Respondent was already aware.

The Act conveys protection to "whistleblowers" who report activity reasonably believed to be fraudulent in nature. The elements of fraud include: (1) a misstatement or omission; (2) of a material fact; (3) made with the intent to defraud; (4) on which the [complainant] relied; and (5) which proximately caused the [complainant's] injury.[102] Williams v. WMX Technologies, Inc., 112 F.3d 175, 177 (5th Cir. 1997). Hence, a fraudulent activity cannot occur without the presence of intent. Under the subjective and objective standards applied to the Act, Complainants must actually believe Respondent acted fraudulently

[102] In the context of securities fraud claims under section 10(b) of the Securities Exchange Act and Rule 10-b5, the "intent to defraud" element is replaced with "scienter." Scienter is defined as "a mental state embracing intent to deceive, manipulate, or defraud, or at minimum, highly unreasonable (conduct), involving not merely simple, or even excusable negligence, but an extreme departure from the standards of ordinary care . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." In re: Alpharma Inc. Securities Litigation, 372 F.3d 137, 148 (3d Cir. 2004); see also Tuchman v. DSC Communications Corportation, 14 F.3d 1061, 1067 (5th Cir. 1994).

and that belief must be reasonable "based on the knowledge available to a reasonable [person]." See Lerbs, supra.

(a) Laura Waldon

(i) Faulty interest calculations

Ms. Waldon testified that she did not believe Respondent acted intentionally with respect to the incorrect interest calculations. Rather, Ms. Waldon believed that any overcharges occurred as a result of an unintentional mistake within Respondent's AS/400 computer system. Ms. Waldon was aware that Respondent was working to resolve the issue and had implemented internal controls until the system could be reprogrammed. Based on her testimony, I find that Ms. Waldon did not believe the incorrect interest calculations occurred as a result of intentional acts by Respondent. If she does not believe the acts were intentional, an essential element is absent to support a reasonable belief that the acts were fraudulent. Consequently, I find and conclude that Ms. Waldon does not meet the subjective standard required to establish protected activity under the Act.

I further find that Ms. Waldon is unable to establish a reasonable belief of fraud under an objective standard. Ms. Schumacher, Mr. McLennan, Ms. Kullman, Ms. Smith, and Ms. Beatty testified that each became aware of the AS/400 interest calculation problem in late 2000. Ms. Schumacher testified that she discovered inconsistent interest calculations on pre-paid accounts through an internal audit of "cash receipts" in the SSC. Respondent's efforts to remedy the situation included full-time reprogramming attempts by the IS department and manual recalculation of accounts as an interim internal control to prevent inaccurate payoffs. Ms. Kullman testified that the problem was considered "high priority" by Internal Audit. Mr. McLennan testified that the CFOs were notified of the problem at a meeting on November 1, 2001. Through the "chain of command," Mr. McLennan relied upon the CFOs to notify their respective RMCs of the interest issue. According to Mr. McLennan, a resolution to the interest calculation problem was included on Respondent's "strategic plan" for fiscal year 2002. As of January 15, 2003, field representatives were alerted that a new program was being implemented. Despite Ms. Waldon's testimony that she first learned of the problem in April 2003, I find Respondent's actions demonstrate that Respondent previously discovered the interest calculation problem, notified company officials, and worked to remedy the problem.

Based on the foregoing, I find and conclude that belief of fraudulent activity is unreasonable under an objective "reasonable person" standard. Given Respondent's efforts to identify the source of the problem and its consistent efforts to remedy the problem, I find that an objective reasonable person would not believe Respondent's actions to be fraudulent.

Assuming a belief of fraud was reasonable under an objective standard, I find that Ms. Waldon's complaints are still not protected activity. Ms. Waldon believed the faulty interest calculations were the unintentional result of programming errors within Respondent's AS/400 computer system. Consequently, her testimony erodes the reasonableness of any belief that Respondent's acts were fraudulent. I find that Ms. Waldon did not believe Respondent acted intentionally, and therefore, Ms. Waldon could not have reasonably believed Respondent was engaged in an intentional, fraudulent act.

Therefore, I find and conclude that Ms. Waldon's complaints of incorrect interest calculations were not protected activity under the Sarbanes-Oxley Act.

(ii) Inconsistent and untimely refunds

Ms. Waldon asserts she engaged in protected activity by complaining about delayed refunds. Specifically, Ms. Waldon testified that she was concerned the delayed refunds would result in violations of Texas and Missouri state statutes. She was concerned that violations of the state statutes would result in sanctions against Respondent and the possible revocation of its license in either or both states.

The Sarbanes-Oxley Act provides protection to employees who report violations of "section 1341, 1343, 1344, or 1348, or any rule or regulation of the Securities and Exchange Commission or any provision of Federal law relating to fraud against shareholders . . ." The Act does not provide protection to employees who report violations of state statutes or laws. In addition, Ms. Waldon testified that she was not aware of Respondent's license being revoked in either state, nor was she aware of Respondent being sanctioned in either state. Based on the foregoing, I find that it was unreasonable for Ms. Waldon to believe Respondent was in violation of the fraud provisions identified in the Act because she specifically testified to a concern regarding state violations only. Consequently, I find and conclude that Ms. Waldon did not engage in protected activity when she expressed concerns about delayed refunds in violation of state statutes.

(iii) Trusting merchandise and cost recognition

Furthermore, I find that Ms. Waldon did not engage in protected activity concerning trusting merchandise and cost recognition. I find that Ms. Waldon did not sufficiently raise complaints or express concerns to reach the level of protected activity under the SOX Act regarding this concern.

Ms. Waldon discussed SAB-101 compliance with Mr. Royster and Mr. Ferguson and inquired whether or not Respondent was taking measures to bring fiscal years 2001 and 2002 in compliance with the regulation. Ms. Waldon expressed her concern to Mr. Hymel that "journal entry adjustments," rather than actual cost adjustments, would create difficulties in the conversion of FSP contracts. However, the record does not support a finding that Ms. Waldon approached any of these individuals with a complaint or concern regarding Respondent's alleged failure to comply with SAB-101 for fiscal years 2001 and 2002. Further, the record does not indicate that Ms. Waldon discussed any concerns with Mr. Crane, the President of the Central Division. Consequently, I find and conclude that Ms. Waldon did not engage in a protected activity due to her failure to raise a concern about an activity that she believed to be a violation of the law. See Lerbs, supra, citing Bechtel Constr. Co. v. Sec'y of Labor, 50 F.3d 926, 931 (11^{th} Cir. 1995)("[g]eneral inquiries do not constitute protected activity . . . a whistleblower must state particular concerns which, at the very least reasonably identify a respondent's conduct that the complainant believes to be illegal."). Furthermore, the record does not sufficiently establish that Ms. Waldon provided any information to any person as described in 18 U.S.C. § 1514(A)(1)(c).

I further find that Ms. Waldon's activities would not be protected because she did not establish a reasonable belief that Respondent's activities were in violation of the fraud provisions of the Act. Ms. Waldon based her concern on "internal consolidated financial statements" for the Central Division which were not filed with the SEC, according to Ms. Waldon and Mr. Hymel. Mr. Budde testified that the report relied on by Ms. Waldon was not SAB compliant because it was used in internal management of the business. Mr. Budde confirmed that the SEC does not require companies to "push numbers down to the divisions" and that the SEC allows consolidated adjustments so long as Respondent's filings are "accurate and correct." Ms. Waldon testified that she was not aware of any SEC regulation mandating that internal working documents reflect the company's financial statements.

I find it unreasonable for Ms. Waldon to believe Respondent was in violation of an SEC regulation. While Ms. Waldon may have actually believed Respondent was in violation of SAB-101, I find such a belief to be unreasonable in light of her testimony that she was not aware of an SEC regulation that required SAB-101 compliance in the company's internal working documents – documents that she knew were not submitted to the SEC.

In support of her position, Ms. Waldon argues that Mr. Budde mislead investors during a third quarter earnings call in September 2003 when he was questioned about an increased cost in merchandise. Mr. Budde responded that the increased cost was an "anomaly." Ms. Waldon believed the statement was misleading because Respondent had been making adjustments to comply with SAB-101. However, Mr. Budde testified that his comment referred to an "anomaly" in the costs related to Respondent's cemetery business, while Ms. Waldon relied on documents showing cost adjustments in Respondent's funeral business. According to Mr. Budde, he informed the shareholders that he could not explain the cost increase because a different "mix" of cemetery merchandise was delivered each period. Hence, more of one product could be delivered over another kind of product during any given period, which would affect Respondent's costs. I find Mr. Budde's testimony credible and further find that the "anomaly" comment does not support Ms. Waldon's position that Respondent intentionally misled its shareholders.

Ms. Waldon also fails to meet the "reasonable belief" requirement because she testified that she did not believe Respondent intentionally failed to comply with SAB-101 for fiscal years 2001 and 2002. As discussed above, intent is an essential element of fraud. Consequently, I find that if Ms. Waldon did not believe Respondent acted intentionally, it is unreasonable for her to believe Respondent acted fraudulently as required under the Act.

Based on the foregoing, I find and conclude that Ms. Waldon did not engage in protected activity because she did not establish a "reasonable belief" that Respondent was in violation of the fraud provisions of the Sarbanes-Oxley Act.

(b) Pat Allen and Dana Breaux[103]

(i) Faulty interest calculations[104]

Ms. Allen and Ms. Breaux each testified that she became aware of the AS/400 interest calculation problem in 2002. Ms. Allen believed the computer system "inadvertently" caused mistakes in interest calculations and that the problem was unintentional on Respondent's part. Ms. Breaux also testified that she did not believe Respondent intentionally caused the interest calculation problem; however, Ms. Breaux believed that Respondent's delay in fixing the problem may have been intentional. Nonetheless, Ms. Breaux knew Respondent was working to fix the computer system. Both she and Ms. Allen testified that testing the new program revealed additional problems which delayed the implementation of a "fix." Neither Ms. Allen nor Ms. Breaux were on the reprogramming team. Ms. Allen further testified that she was not working in Special Projects at the time the interest calculation issue arose. Consequently, she did not know what kinds of internal controls were in place to manually address the issue.

Ms. Allen and Ms. Breaux both believed the creation of the interest calculation problem was unintentional. As intent is an essential element of fraud, I find it is unreasonable for Ms. Allen and Ms. Breaux to believe Respondent engaged in a violation of the fraud provisions of the Sarbanes-Oxley Act. See 1(a)(i), above.

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[103] According to Ms. Allen's resume, her duties as a QA representative/Director of Administrative Training included the following: (1) act as a liason between the SSC and the "core operating business;" (2) review operations and identify opportunities for improvement; (3) identify, research, and provide solutions for problems that interfere with providing customer service; (4) present customer service issues to management and act to resolve and prevent such issues; and (5) ensure compliance with company policies and procedures through "location audits" and report findings to management. (RX-31, p. 1). Accordingly, I find that Ms. Allen and Ms. Breaux, in reporting their concerns to their supervisors, acted within the scope of their duties as QA representatives.

[104] For the first time at hearing, Ms. Breaux indicated that she believed the faulty interest calculations violated Truth in Lending laws. Complainants's complaint in this matter does not allege any such violation. However, I find the record vague as to whether she actually reported these concerns to Respondent. Ms. Breaux testified at the hearing that she and the CFOs "discussed" compliance with Truth in Lending in September 2003. However, at her deposition, Ms. Breaux admitted she did not inform anyone that she believed the interest calculations violated "a law." Consequently, I find that the preponderance of the record does not support a conclusion that Ms. Breaux engaged in protected activity regarding Truth in Lending violations.

Ms. Breaux testified that she believed Respondent intentionally delayed the implementation of a new interest calculation program. After Ms. Breaux spoke to Ms. Apolinar about the "hush-hush" comment allegedly made by Ms. Beatty, Ms. Breaux began to think the delay occurred because Respondent tried to keep the interest calculation problem a secret. However, Ms. Breaux did not seek clarification of the "hush-hush" comment from Ms. Beatty. The testimony of Ms. Beatty and Ms. Schumacher, who investigated the incident, established that Ms. Beatty did not use the phrase "hush-hush." Ms. Beatty credibly testified that she simply instructed Ms. Apolinar not to attempt to explain the amortization process to customers.

Given Ms. Breaux's knowledge that Respondent had been working on a new program as early as May 2002 and considering her testimony that she knew the implementation of the new program was delayed after the "testing phase" revealed additional problems, I find that it was unreasonable to assume Respondent delayed the implementation of a new program in an attempt to conceal or "secret" the problem. Consequently, I find and conclude that Ms. Breaux failed to establish a reasonable belief of fraudulent activity under an objective "reasonable person" standard.

Ms. Allen and Ms. Breaux failed to establish a reasonable belief that Respondent was in violation of any fraud provision of the Sarbanes-Oxley Act. Consequently, I find and conclude that their activities in reporting the perceived violations of the Act do not constitute protected activity.

(ii) Inconsistent and untimely refunds

Ms. Allen testified that Respondent's inability to timely issue refunds exposed the company to lawsuits in those states that have "guidelines." Ms. Allen referred to the timeframes required by Texas and Missouri state laws. As discussed in 1(a)(ii), above, the Sarbanes-Oxley Act does not protect Complainants who report violations of state laws. Rather, the Act only affords protection to Complainants who report reasonably perceived violations of the enumerated fraud statutes or federal laws. Based on Ms. Allen's testimony, I find and conclude that she failed to establish a reasonable belief that Respondent was in violation of the fraud provisions. Consequently, I find and conclude Ms. Allen did not engage in protected activity when she reported her concerns about untimely refunds which may have violated state laws.

A complainant is not required to "specifically identify the code section that [she] believe[s] was being violated." Collins, supra. However, the complainant's concerns must be "particular" enough to "reasonably identify" the conduct believed to be illegal. See Lerbs, supra. Ms. Breaux testified that she complained about refund problems and a "continuous backlog" of disputed accounts within Special Projects. The record establishes a general belief that the untimely issuance of refunds exposed Respondent to potential litigation from customers. Without any further particularity or direction concerning which laws Respondent allegedly violated, I find and conclude the record fails to establish that Ms. Breaux reasonably believed the inconsistent and untimely refunds violated the fraud provisions of the Act. Consequently, I find and conclude that Ms. Breaux did not engage in activity protected under the Sarbanes-Oxley Act.

(iii) Pending other sources

Ms. Allen and Ms. Breaux expressed concerns regarding Respondent's "pending other sources" system. According to Ms. Allen and Ms. Breaux, the POS system made it difficult for Respondent to collect account balances when a third party denied responsibility for payment.

Ms. Breaux testified that she did not possess enough legal knowledge to state whether Respondent's POS violated any laws. Even assuming Ms. Breaux did believe Respondent violated the fraud provisions of the Act, I find that her belief is not reasonable based on an objective standard. While Ms. Breaux testified that Respondent's POS system resulted in inflated receivables and affected shareholders' financial statements, both Ms. Allen and Ms. Breaux admitted that the customer remained ultimately responsible for his account balance. In addition, Ms. Allen and Ms. Breaux testified that Respondent attempted to collect outstanding balances from customers after an "other source" denied payment. According to Ms. Allen, Respondent collected the outstanding balances through Customer Service and third party collection agencies. Because Complainants were aware that Respondent employed procedures to collect on the POS balances, I find it unreasonable for Ms. Allen and Ms. Breaux to believe that Respondent acted fraudulently regarding pending other sources.

Based on the foregoing, I find and conclude that Ms. Allen and Ms. Breaux did not engage in protected activity concerning "pending other sources" because they failed to establish a reasonable belief of a violation of the fraud provisions set forth in the Sarbanes-Oxley Act.

I find and conclude that Complainants did not engage in protected activity when they expressed their concerns to Respondent.

However, assuming **arguendo**, that the foregoing activities were protected, Complainants still bear the burden of proving by a preponderance of the evidence that Respondent was aware of the protected activity and that the protected activity contributed to an adverse employment action.

(2) Was Respondent aware Complainants engaged in protected activity?

A complainant is not required to prove "direct personal knowledge" on the part of the employer's final decision-maker that she engaged in protected activity. The law will not permit an employer to insulate itself from liability by creating "layers of bureaucratic ignorance" between a whistleblower's direct line of management and the final decision-maker. Frazier v. Merit Systems Protection Board, 672 F.2d 150, 166 (D.C. Cir. 1982). Therefore, constructive knowledge of the protected activity can be attributed to the final decision-maker. Id.; see also Larry v. Detroit Edison Co., Case No. 1986-ERA-32 @ 6 (ALJ October 17, 1986); Platone, supra.

The record indicates that Ms. Waldon complained about the interest calculation problem to Ms. Kirkpatrick and Ms. Smith. It further indicates that she complained about untimely refunds to Ms. Kirkpatrick, Mr. Crane, and Mr. McLennan. Ms. Waldon also discussed SAB-101 compliance with Mr. Ferguson and Mr. Hymel. Ms. Allen expressed concerns regarding the "dispute resolution process" with Ms. Smith, Ms. Beatty, Ms. Kirkpatrick, and Mr. McLennan. Ms. Allen addressed the interest calculation issue through discussions with Ms. Kirkpatrick and Ms. Schumacher. She further expressed concerns to Ms. Smith, Ms. Kirkpatrick, and Ms. Schumacher regarding untimely refunds. Ms. Allen and Ms. Breaux notified the CFOs and Ms. Beatty of their concerns with "pending other sources." Ms. Breaux reported the interest calculation problem to Ms. Kirkpatrick and Ms. Schumacher. She complained to Mr. McLennan about refund "problems" in 2000. She complained to Ms. Smith about the backlog of disputed accounts and she notified Mr. Tullier, the CFO of the Eastern Division, of Respondent's backlog of refunds.

She also raised concerns about delayed refunds during a meeting with Ms. Schumacher.

Assuming **arguendo** that Complainants's activities were protected under the Sarbanes-Oxley Act, which I have previously concluded were not, I would find and conclude that Respondent had knowledge of Complainant's activities. The record establishes that every Complainant reported each of her concerns to at least one person arguably employed in a supervisory position as required by the Act.

(3) Did Complainants experience an adverse employment action?

(a) Credit card write-up and altered document investigation

Although the complaint filed in this matter does not allege retaliation through either action, Ms. Allen testified that she believed the credit card write-up and the altered document investigation were retaliatory. The Sarbanes-Oxley Act requires a complainant to commence her action "not later than 90 days after the date on which the violation occurs." 18 U.S.C. § 1514A(b)(2)(D).

Ms. Allen received a "write-up" for three instances of improper use of a company credit card in October 2002, which she signed on November 13, 2002. Complainants filed their complaint in the instant matter on January 28, 2004. Thus, only adverse actions occurring after October 28, 2003, can be the subject of a remedy in this matter. Consequently, I find and conclude that any claim regarding the credit card write up in 2002 is time barred because it occurred more than 90 days prior to the filing of the complaint.

Ms. Allen was involved in an altered documents investigation in late April 2003. She signed a statement regarding her role in processing the questioned refund request. On May 13, 2003, Ms. Kirkpatrick reminded Ms. Allen that she was on "Final Written Warning" and the incident would be documented. Again, the altered document investigation occurred more than 90 days before the complaint was filed in this matter. Accordingly, I find and conclude that a claim of retaliation with regard to the altered documents investigation is also time barred.

(b) Error rates and workspace relocation

Respondent contends that an adverse employment action must have a "tangible job consequence." Dolan v. EMC Corp., Case No. 2004-SOX-1 @ 3 (ALJ March 24, 2004)(citing Shelton v. Oak Ridge Nat'l Laboratories, Case No. 1995-CAA-19 (ARB March 30, 2001)); see also, Ilgenfritz v. U.S. Coast Guard, Case No. 1999-WPC-3 (ARB Aug. 28, 2001)(holding that a negative performance evaluation, absent tangible job consequences, is not an adverse action). A tangible job consequence has been defined by the U.S. Supreme Court as one which "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Hendrix v. American Airlines, Inc., Case Nos. 2004-AIR-10 and 2004-SOX-23 (ALJ Dec. 9, 2004), citing Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998). I find and conclude that Complainants have failed to establish that they experienced a tangible job consequence from either the increased error rates or the workspace relocation.

Ms. Waldon and Ms. Allen have not established that increased error rates changed the terms or conditions of their employment. While Ms. Allen's bonus plan for 2003 required a low error rate, Ms. Allen received her 2003 bonus despite the increased error rate for the Central Division.[105] The record contains absolutely no evidence that the error rates had an actual negative impact on their employment. At most, the record establishes that a high error rate carries a negative connotation and reflects a negative evaluation of an employee's performance. However, both Ms. Waldon and Ms. Allen continued to receive good work evaluations. Consequently, I find and conclude that an increase in error rates does not constitute an adverse employment action because Ms. Waldon and Ms. Allen failed to establish that it resulted in a tangible job consequence.

Similarly, the workspace relocation did not result in a tangible job consequence. The testimony of Ms. Allen and Ms. Breaux establishes that they were unhappy with their new workspace because it lacked the amenities of their old work stations, i.e., overhead storage, smaller desk area, no personal storage area, and lighting. Although they believed the move to a new work area was retaliation for their complaints, the

[105] Ms. Waldon also received her bonus for 2003, but the record does not reflect whether it was conditioned on her error rate.

absence of these amenities, in itself, does not rise to the level of a tangible job consequence as required under whistleblower protection. The record does not suggest that the new work stations compromised their ability to complete job tasks, nor does it suggest that the relocation negatively affected their employment with Respondent in any manner. In fact, both Ms. Allen and Ms. Breaux testified that they were able to continue performing their job functions in the new workspace, despite the identified inadequacies. Consequently, I find and conclude that the workspace relocation was not an adverse employment action.

Complainants contend that an adverse employment action is one that is "likely to deter employees from making protected disclosures." Halloum, supra; see also, Ray v. Henderson, supra, at 1243. (A complainant need not prove termination or suspension from the job or a reduction in salary or responsibilities). According to Complainants, the increased error reports and work space relocation are sufficient to deter an employee from participating in protected activity. I disagree with Complainants's contention.

I find Complainants's reliance on Halloum to be misplaced in the present case. In Halloum, the complainant received modified "CAP assignments" which an independent investigator identified could be "so onerous as to guarantee failure and serve as a means of removing a whistleblower entitled to protection." The ALJ found that the modified "CAP goals" were in fact unattainable and would result in the complainant's "certain failure" and subsequent termination. Accordingly, the ALJ held that the employment action had an adverse affect on the terms of the complainant's employment and would deter other employees from making protected disclosures.

Unlike Halloum, Complainants in the present matter have failed to establish that either the increased error rates or the workspace relocation had any actual adverse affect on the terms of their employment. Both Ms. Waldon and Ms. Allen received a 2003 yearly bonus, despite the increased error rates for the Central Division. Ms. Allen and Ms. Breaux testified that their new workspaces did not inhibit their ability to perform their work tasks. Additionally, all three Complainants continued to receive good evaluations from their supervisors. Based on the absence of an effect on their bonuses or other terms of employment, I find and conclude that neither the error rates nor the workspace relocation would deter other employees from engaging in protected activity.

Complainants's contention that they experienced adverse employment actions is further diminished by the fact that they were not singled out. While the record reflects that the error rate for the Central Division steadily increased from January 2003 to January 2004, the record does not reflect how frequently errors were marked against either Ms. Waldon or Ms. Allen. Ms. Smith testified that the Central Division always had the highest error rate of the four divisions and that its error rate continued to increase after Complainants ceased employment. Thus, the record does not support a conclusion that the Central Division's error rate increased due to errors marked against only Ms. Waldon and Ms. Breaux. While they may have contributed to the divisional increase in error rate, that alone is not enough to support a conclusion that other employees would be deterred from engaging in protected activity on this basis.

As to the workspace relocation, Mr. DoCampo relocated to the same work area as Ms. Breaux and Ms. Allen. He had not engaged in protected activity prior to the relocation and felt the new workspace to be adequate. According to Mr. DoCampo, the QA representatives were provided with the necessary equipment for performance of their jobs. The record also indicates that other employees were being relocated within the building to accommodate the corporate offices. Accordingly, I find that Complainants have not established that the workspace relocation would deter other employees from making protected disclosures because they have not established a connection between the relocation and their alleged protected activity.

Based on the foregoing, I find and conclude that Complainants have not established that they experienced an adverse employment action. Complainants have not established that either the error rates or the workspace relocation resulted in any tangible job consequence. Further, Complainants have not shown that either action would have deterred other employees from making protected disclosures.

(c) Hostile Work Environment

In a whistleblower case, the ALJ must weigh the following five factors to evaluate whether a hostile work environment claim has been established: (1) the [complainant] suffered intentional discrimination because of his or her membership in the protected class; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the [complainant]; (4) the discrimination would have detrimentally affected a reasonable person of the same protected class in that position; and (5) the existence of **respondeat superior** liability. Varnadore v. Oak Ridge National Laboratory, Case Nos. 1992-CAA-2 and 5, 1993-CAA-2 and 3, 1995-ERA-1 (ARB June 14, 1996).

(1) Laura Waldon

As a result of her alleged protected activity, Ms. Waldon believed she was "stonewalled" because the SSC was "unresponsive" to her requests and because she encountered delays in receiving information from the SSC. She believed that her requests were purposefully delayed as a result of her complaints. Ms. Waldon also believed she experienced retaliation because she was not "welcomed" upon her arrival in New Orleans and because Mr. Crane began reviewing her expense reports. I find and conclude that these allegations are not sufficient to establish a hostile work environment when the record is considered as a whole. First, Ms. Waldon was not provided with a permanent office upon her arrival in New Orleans because Respondent was in the process of having her office built. Further, she was provided with a rental car in New Orleans until a company car became available for her use. Additionally, Mr. Crane testified that he began reviewing all expense reports in an effort to monitor costs. He specifically requested Ms. Waldon's expense reports because there were certain expenses Respondent had agreed to pay while she worked in New Orleans, and he wanted to ensure compliance and understanding of that agreement. Thus, I find and conclude that none of Ms. Waldon's allegations are intentional discriminatory acts based upon Ms. Waldon's membership in a protected class; i.e., as a whistleblower.

As to the "stonewalling" which arguably may have been an intentional discriminatory act, Ms. Waldon has failed to establish that the actions were based on her protected activity, were "pervasive and regular," or were detrimental to her performance. Ms. Waldon admitted that she experienced the same problems receiving information from the SSC before she began making complaints. Ms. Waldon presented no evidence to establish how frequently she was "stonewalled" by the SSC. While she testified that her job performance was hindered by the uncooperative attitude of the SSC, she testified that she always received good work evaluations. Mr. McLennan denied "stonewalling" Ms. Waldon or hindering her job performance. [106]

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[106] When Mr. McLennan informed Ms. Williams that he would discuss the refund turnaround time with Ms. Waldon, Ms. Waldon believed it was an attempt to bully her direct report. However, I find the comment does not create or add

Consequently, I find and conclude that Ms. Waldon has not presented sufficient evidence to establish that she experienced a hostile work environment as a result of her protected activities.

(2) Pat Allen and Dana Breaux

Ms. Allen and Ms. Breaux contend Respondent created a hostile work environment in several ways. Ms. Allen stated that she did not receive answers to questions posed to the SSC, which she referred to as "stonewalling." Ms. Breaux did not use the term "stonewalling" but also alleged that she encountered "resistance" from the SSC in resolving issues. Both Ms. Allen and Ms. Breaux testified that they were excluded from e-mails, meetings, and were not notified of policy and procedural changes.

I find and conclude Complainants have not established a hostile work environment as a result of their alleged protected activity. Prior to making any complaints, Ms. Breaux had difficulty obtaining information about problematic refunds and disputed accounts. Further, Mr. DoCampo testified that he also felt "friction" and a lack of communication between the SSC and the QA representatives. As to the e-mails, meetings, and procedural changes, Mr. DoCampo testified that he was left out of such communications, as well. Together, these factors diminish the contention that the alleged discriminatory actions occurred because Complainants engaged in protected activity.

Moreover, Complainants failed to establish the frequency that they experienced "stonewalling" or exclusion from communications. As a result, I find that they have not established that the discrimination was pervasive and regular. Additionally, while Complainants testified that their job performance was hindered, Ms. Allen and Ms. Breaux received good work evaluations. Additionally, Mr. DoCampo did not testify that he was detrimentally affected by Respondent's actions. Consequently, the record does not support a finding that the Respondent's actions detrimentally affected Complainants or would have detrimentally affected a reasonable person in Complainants's positions.

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to a hostile work environment, nor does it constitute a "threat" towards Ms. Waldon. The statement was made to Ms. Williams and Mr. McLennan never directly addressed the matter with Ms. Waldon.

Based on the foregoing, I find and conclude that all three Complainants have failed to carry their burdens of production and persuasion by a preponderance of the evidence that Respondent created a hostile work environment in retaliation for their alleged protected activities.

(d) Respondent's Legitimate Non-discriminatory Business Reason for Its Action

A careful review of Complainants's formal complaint (ALJX-1) reveals it is devoid of any allegation that Respondent's reduction in force was not a legitimate business decision. Complainants did not contend at the formal hearing, nor present any supportive record evidence, that Respondent's decision to implement a reduction in force was not a justified legitimate business action. Furthermore, Complainants acknowledged that Respondent's financial position had declined in the three to four years before the December 3, 2003 reduction in force. They were aware of Mr. Rowe's remarks during the "state of the company" address in the summer of 2003 that a RIF was possible.

Upon assuming a position as Acting Chief Operating Officer, in August 2003, Mr. Rowe announced that a "cost-cutting initiative" or reduction in operating costs of $20 million was necessitated by a decline in the funeral business over the five previous years. Stock prices had peaked at $28.00 a share in April 1998, but fell and rose through September 2001. Prior to implementing the reduction in force, stock prices were down to $4.85 a share.

As a provider of death care services and merchandise in 28 states, Respondent was operating 256 funeral homes and 198 cemeteries. A decision was made to sell some of the businesses, which would eliminate 200 jobs. An estimated $10 million cost reduction could be achieved in labor costs before benefits by reducing 300 additional jobs in the four operating divisions. Non-labor costs were to be effective by November 1, 2003, but labor costs could not be implemented until December 3, 2003. The reduction in force was the only RIF for Respondent during Mr. Budde's twenty-year employment.

It is undisputed that Respondent's financial performance has improved "significantly" since the RIF. As of June 2004, stock values had increased to $8.14 a share. There is no contrary evidence of record.

In the absence of any compelling countervailing evidence or contentions, it would be inappropriate for the undersigned to substitute my judgment for that of Respondent, or speculate whether the business decision was correct. Therefore, I find and conclude that Respondent planned and implemented cost cutting initiatives for labor and non-labor expenses based on a business need and desire to reduce costs and strengthen the company. I further find that Respondent's action was a legitimate and justified non-discriminatory business decision. Contrary to any implicit argument which Complainants may be advancing that the RIF was conducted as a pretext to discriminate solely against them, I find and conclude that the record is totally lacking in any evidence supportive of such a contention.

(e) The Selection of Complainants for Reduction in Force

Notwithstanding the foregoing finding and conclusion that the reduction in force was motivated by a bona fide business justification, Complainants may show pretext by demonstrating that the specific reasons given for their selection were pre-textual. Here, as in most cases of discrimination or retaliation, there is no direct evidence of intent. Complainants are not required to show specific knowledge that Respondent had the intent to discriminate against them, but may demonstrate Respondent's motivation through circumstantial evidence of discriminatory intent. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-40, @ 5-7 (ARB June 21, 1996).

However, there is no record evidence of any animus or resentment directed toward or harbored against any Complainant by any Respondent official or supervisor. Ms. Allen and Ms. Breaux rely upon Mr. McMillan's "move on" comment to Ms. Schumacher during the investigation of Ms. Kirkpatrick's complaints as a basis for animus. Neither had voluntarily interviewed with Ms. Schumacher, but rather did so only at the request of Ms. Kirkpatrick. Their complaints were viewed as HR matters and not Internal Audit issues. I am not persuaded, without more evidentiary support, that such a comment from Mr. McMillan constitutes animus toward Ms. Allen and Ms. Breaux.

As previously noted, increased error rates of Ms. Allen did not result in any tangible job consequence, nor did the relocation of Ms. Allen and Ms. Breaux. Consequently, I find neither action exhibits animus toward Complainants, particularly since they were not singled out.

Moreover, Ms. Breaux and Ms. Allen began complaining about various issues as early as 2000 (three years before her selection for RIF) and 2002 (more than one year before her selection for RIF), respectively. One factor considered in proof of a **prima facie** case is the temporal proximity of the alleged adverse action to Respondent's knowledge of the Complainant's protected activity. Jackson v. Ketchikan Pulp Co., Case No. 1993-WPC-7 and 8 (Sec'y Mar. 4, 1996). The lack of temporal proximity is also a consideration, especially when there is a legitimate intervening basis, as here, for the adverse action. See Evans v. Washington Public Power Supply System, Case No. 1995-ERA-52 (ARB Jul 30, 1996).

A common thread throughout the arguments of Complainants is Respondent's lack of documentation to support their selection for the RIF. Complainants rely heavily upon Tyler v. Union Oil Company of California, 304 F.3d 379 (5th Cir. 2002), which is entirely distinguishable from the instant case. Tyler involves an age discrimination case in which employees were selected for a reduction in force **based on performance**. The Employer's Human Resources Policies and Procedures Manual prescribed, **inter alia**, "planning [for a RIF] should include . . . **documentation of non-discriminatory reasons for adverse personnel decisions**." (Emphasis added). The Employer's official acknowledged that he did not retain any documentation reflecting the reasons for employment decisions, and in fact shredded whatever documents he had, nor did he review any performance appraisals. The Court concluded that Employer's unexplained departure from its usual policies and procedures when conducting the RIF may in appropriate circumstances support an inference of discrimination if the employee establishes some nexus between the employment action and his protected activity. Id. at 15.

Complainants argue that, like Tyler, Respondent did not follow its RIF selection process set out in its Manager's Resource Guide and, therefore, Respondent's lack of documentation proves retaliatory motive in selecting Complainants for the RIF. Thus, they argue that Ms. Schumacher had no documents to support her position that Ms. Waldon's job would be eliminated in the future; there were no written reasons for Ms. Breaux's or Ms. Allen's selection; and not an "iota of documentation" to support the decision to terminate Complainants which was not handled in accordance with the Guide. Complainants further aver there was no written study by the division presidents of the impact of the RIF of QA representatives; no documents to show the application of the criteria in the Manager's Resource Guide or of an objective selection criteria; the divisional presidents did not consider Ms. Breaux's and Ms. Allen's skills, competency and experience or the needs or location of the department; and the justifiable reasons for termination of the QA position were not documented.

Documentation of employment actions is not mandated by the SOX Act. In the absence of an employer policy or procedure dictating documentation of personnel decisions, none appears to be required by jurisprudence. Complainants have not cited any, other than Tyler, which is inapposite. The lack of objective criteria, written studies, written reasons or a review of performance appraisals or skills, competencies and experience do not demonstrate that the RIF was motivated by discrimination, if the RIF was otherwise legitimate and justified, as here, particularly since Complainants have not shown a nexus between their alleged protected activity and Respondent's employment action. See generally, Paluck v. Gooding Rubber Company, 221 F.3d 1003 (7th Cir. 2000).

Contrary to Complainants's contention that Respondent failed to document that it considered the "skills, competencies and experience" of the Complainants, I find and conclude the Manager's Resource Guide does not prescribed such an analysis in conducting selections for a RIF. The Guide provides for two categories of selection: (1) when eliminating job functions, no such analysis is required; however, (2) when individual selections are made, "management considered the tenure of employees in the decisional unit, measures of their performance, relevant education and certifications and experience." The sample "answer" to employee inquiries concerning their selection conveys the criteria for individual selections. (RX-8, p. 5).

1. Pat Allen and Dana Breaux

Given the foregoing, an analysis of Respondent's conduct is necessary. Mr. Budde, Mr. Stevens, Mr. Strickland and Mr. Crane testified that each revenue-producing division was assigned a pro rata proportion of Respondent's total revenue as a reduction target. No guidelines or specific instructions were provided to division presidents who were to determine how to reach their goals and the extent of the necessary labor cuts in each division. The end objective was not to affect the quality of services provided to the families of customers/clients.

In the Eastern Division, Mr. Stevens identified divisional support functions and excess layers of management, who did not interact with customers on a daily basis, as his target group. The QA position [Ms. Breaux] was placed on the elimination list early in the process since the job was regarded as a disposable "support function," and as a liaison between the regions or field and the SSC. He concentrated on positions, not persons, for elimination. After compiling his initial list of eliminations, he met with other regional executives. He did not consult with Mr. Tullier before selecting the QA representative function for elimination. He accepted Mr. McLennan's recommendation to combine quality control into the CAFÉ function to be absorbed by the SSC. He did not review Ms. Breaux's employment record for performance criteria or to determine if she was suited for another position with the division, since the reduction in force was not a "redeployment" of personnel, but a restructuring of the division. He selected 13 divisional positions for elimination and "split" the remaining revenue costs proportionately among the three regional/field areas which eliminated 65 positions.

In the Western Division, Mr. Strickland had previously merged two RMCs into one center and closed other facilities. He did not receive any instructions on which positions to eliminate. The ultimate decision was left to his judgment as a divisional president. Although he received suggestions from Mr. McLennan, he decided not to implement them in the Western Division. Mr. Strickland concentrated on eliminating "functions" which were not "delivering services to the families." He considered and eliminated positions in the IS department, office workers, telemarketing groups and positions with higher salaries. Of the 25-28 positions eliminated, 10 to 12 were divisional positions. He chose not to eliminate the incumbent of the QA/administrative training function, Mike Koester, whose job did not involve CAFÉ administration.

The Central Division, which is Respondent's largest division with 1,400 employees and 90 businesses in 13 states, generates the greatest portion of Respondent's revenues. Thus, it is axiomatic that the Central Division would have the largest pro rata proportional share of the reduction. Mr. Crane met with an HR representative to discuss the elimination of positions and made or approved all decisions on which positions to include in the reduction. He did not receive any instructions upon which to base his decision to eliminate any positions. His selection of job positions for elimination was not based on employee performance. Mr. Crane considered primarily "back office people or support people." He included the QA position [Ms. Allen] for elimination because the QA representative "did not meet with clients" and their liaison function could be performed by the RMC managers. He eliminated 78 positions of which 15 to 18 were vacant positions and subsequently posted 30 to 40 positions in the Central Division, mostly at the regional and field level and none at the divisional level. Additionally, Mr. Crane proposed to eliminate one of three RMCs and the resulting reduction in incumbent positions, and to move the FSP from Kansas City to New Orleans. The Kansas City office was subsequently closed.

The QA representative position was an entire job function with only one incumbent per division. It is undisputed that the QA representative did not deal with or interface directly with customers or clients. Each divisional president operated independently and used their judgment in selecting function elimination. I find the record is bereft of any evidence that Mr. Stephens and Mr. Crane conferred with Mr. Tullier and Ms. Schumacher, respectively, before selecting the QA function for elimination. Complainant's argument that the CFOs, who had knowledge of Ms. Breaux and Ms. Allen's alleged protected activity, influenced the divisional presidents to select the QA function is unsupported and without merit.

Ms. Breaux has not alleged any discriminatory retaliation against her by Mr. Stephens. Ms. Allen has not alleged any discriminatory retaliation against her by Mr. Crane. Furthermore, any causation related to Ms. Allen and Ms. Breaux's alleged protected activity was compromised by the intervening business decision to implement a RIF. Moreover, there existed a lack of temporal relationship between their complaints initiated as early as 2002 and 2000, respectively, and their selection for RIF on December 3, 2003. I am not convinced that Ms. Allen and Ms. Breaux have established any persuasive evidence of a nexus between their alleged protected activity and their selection for RIF. Nor is there any direct or circumstantial evidence of discriminatory intent to select them for the reduction in force. Therefore, I find and conclude that there is an absence of a supportive inference of discrimination.

I do not attach any sinister motive to the exit interviews of Ms. Allen and Ms. Breaux conducted by Ms. Schumacher and Mr. Sprick. All three QA representatives in New Orleans met as a group with Ms. Schumacher, the only CFO in New Orleans, and Mr. Sprick of the HR department. Thereafter, one-on-one meetings, which could not be conducted logistically as required by the Guides, were conducted by Mr. Sprick with Mr. Tullier on the telephone with Ms. Breaux. Ms. Schumacher was the CFO for the

Central Division and Ms. Allen's supervisor with whom Ms. Allen met in her one-on-one meeting with Mr. Sprick. Mr. Docampo spoke by telephone with Mr. Friou of the Southern Division, who was his supervisor, with Mr. Sprick present. I find and conclude that no violations of the Guides were manifested by such meetings. Ms. Schumacher was not present during the one-on-one meetings with Ms. Breaux or Mr. Docampo.

Ms. Allen and Ms. Breaux claim that they were "singled out" to be retaliated against because of individual telephonic discussions with their respective CFO supervisors is entirely baseless and not supported by the record evidence. Similarly, the record does not sustain a finding that Mr. Sprick was present at one-on-one meetings "to make sure [they] went smoothly;" rather his presence was HR coverage as provided by Respondent's Guide. I find that the manner in which Respondent conducted such meetings did not exhibit animus or retaliatory motive/intent toward Ms. Allen or Ms. Breaux.

Complainants's contention that Mr. Docampo was included in the RIF because Respondent could not "just terminate" Ms. Allen and Ms. Breaux is also meritless. No record evidence confirms such a theory. Mr. Docampo was rehired in January 2004 after posting for an advertised position and undergoing two interviews, a process which was equally available to Ms. Allen and Ms. Breaux, who did not apply for such position or any other.

Although Complainants argue that Respondent's pledge for "consistency and fairness" in the RIF was not met by divisional presidents, no explication was proffered nor was any contradictory evidence of the validity of the selection process. They further advance an empty assertion that Mr. Strickland, who was the least tenured of Respondent's divisional presidents, "knew more about managing than his counterparts" simply because he retained Mr. Koester, whereas all other divisional presidents acted in harmony by eliminating the QA function as unnecessary.

Equally preposterous and unfounded in the record is Complainants's speculative theory that there was "no other reason" for Ms. Schumacher to accept the Central Division CFO position as a lateral move except to terminate Ms. Allen and Ms. Breaux, whom she did not supervise, or to get rid of two direct reports, Ms. Allen and presumably Ms. Waldon.

In view of my findings hereinabove regarding other alleged adverse actions against Ms. Allen and Ms. Breaux, I further find and conclude that neither Complainant has demonstrated that their alleged protected activity was a contributing factor in the selection of the QA representative function for elimination by the reduction in force. I further find that Respondent has shown by clear and convincing evidence that their selection was motivated by a legitimate non-discriminatory business reason.

Assuming **arguendo** that Complainants could substantiate their alleged protected activity was a contributing factor to adverse action, the record does not support a finding or conclusion that Respondent's selection explanation/reason was a pretext for discrimination. Complainants have not demonstrated that the Respondent's reasons were a "pretext for discrimination" since they have not substantiated Respondent's reasons were false **and** that discrimination against Complainants was the real reason for Respondent's selection decision.

Accordingly, I find and conclude the complaint allegations of Ms. Allen and Ms. Breaux that they were discriminatorily selected for a reduction in force have not been established and therefore their complaints are hereby **DENIED**.

(2) Laura Waldon

Mr. Crane credibly testified that Ms. Waldon was not initially included on the reduction in force list. It is undisputed that after meeting with Mr. Crane and Ms. Schumacher and learning that the FSP was being relocated to New Orleans and the RMC in Kansas City would be consolidated, Ms. Waldon inquired about her job security and position. Ms. Schumacher informed Ms. Waldon that she had no knowledge that her position would be affected by the RIF and had no intention of eliminating the position. Ms. Waldon acknowledged that Ms. Schumacher indicated her position "would be eliminated in the future," but was needed to transition the FSP. Ms. Schumacher informed Ms. Waldon the elimination would not occur in the RIF of December 2003.

I do not accept Ms. Waldon's testimony as credible that she was offered a position as a trainer "in the Midwest" on October 31, 2003. It is undisputed that Mr. Crane had informed Ms. Waldon on at least two prior occasions that her job was secure. Thus, I further find it is more plausible that Ms. Schumacher asked Ms. Waldon to remain in her DOA position and consider transferring to a training position "in the future."

Thereafter, discussions began between Ms. Waldon and Ms. Schumacher about "transition of duties and the FSP" and completing the conversion. Ms. Waldon acknowledged that she wanted a "deadline" when her job would end. She envisioned three options: staying in New Orleans, working in Kansas City or turning in her notice. She would have no alternative but to tender her two-weeks notice if the first two options were not acceptable. However, she did not threaten to quit if her demands were not met. Ms. Schumacher initially viewed Ms. Waldon's list of demands as a resignation effective immediately if her requests were not achieved.

Although Ms. Waldon and Ms. Schumacher exchanged proposals and ideas for a "separation agreement," no signed agreement was reached. According to Ms. Schumacher's uncontroverted testimony, Ms. Waldon refused to return e-mails and telephone calls regarding such proposals. Mr. Crane's testimony that he spoke with Ms. Waldon about the fact that they had achieved a satisfactory agreement is also uncontradicted. I find that Ms. Waldon and Respondent reached agreement on a retention agreement for her last date of employment and on various demands based on her separation from employment, which Respondent subsequently fulfilled. Even after leaving Respondent's employment, Ms. Waldon, through her attorney, requested payment of her lease expenses and a pro rata share of her 2004 bonus, as outlined in the proposed separation agreement/demands.

Ms. Waldon worked through the agreed-upon deadline of January 31, 2004. Whether Ms. Waldon's actions constitute a resignation is not determinative of her status. I find her DOA position was not eliminated on October 31, 2003 or December 3, 2003. Mr. Crane and Ms. Schumacher agreed that Ms. Waldon would still be employed as DOA if she had not initiated her demands. I find such a conclusion, given the facts of this matter, entirely probable and plausible. Ms. Waldon agreed to a separation date, rather than giving a two-weeks notice. If she had effectively resigned, she would not have received her "demands." She was placed on the RIF list on November 26, 2003, after reaching agreement on a separation date effective January 31, 2004. I find Ms. Waldon presented Respondent with **a fait accompli** regarding her continued employment status.

Ms. Waldon's argument in brief that Ms. Schumacher recommended her inclusion in the RIF four days after assuming the CFO position, eliminated her DOA position and asked her to work in a training capacity on October 31, 2003, is not factually supported by the instant record.

Notwithstanding the foregoing, I further find and conclude that the record is devoid of any cogent evidence that Ms. Waldon's alleged protected activity was a contributing factor in her placement on the RIF list. Ms. Waldon lodged complaints as early as 1999, well before the December 2003 RIF which clearly detracts from any temporal proximity relationship theory. Furthermore, Ms. Waldon's written diary of events from May 12, 2003 through July 21, 2003, and on January 14, 2004, which was maintained "to protect herself" and to record any happening that was "odd," fails to mention any complaints voiced about the various alleged fraudulent issues raised or any alleged retaliatory acts, including her placement on the RIF list.

Ms. Waldon's contention of disparity that she was the only DOA reduced is not persuasive. Six DOAs were selected for the RIF from various levels. Although the record discloses that Ms. Welch, who was a DOA in the Eastern Division and reported to CFO Tullier, was not eliminated, she made no similar severance/employment demands as did Ms. Waldon. There is no record evidence that Ms. Welch presented any ultimatum regarding her job tenure, as did Ms. Waldon. Ms. Waldon, like Ms. Welch, was not initially placed on the RIF list. Therefore, I am not convinced that Ms. Waldon was treated differently than Ms. Welch or other DOAs because of her protected activity.

Contrary to Ms. Waldon's contentions, the record does not factually support a theory that Ms. Waldon was constructively replaced or that there are any inconsistent or conflicting explanations for Respondent's placement of Ms. Waldon on the RIF list.

Moreover, Ms. Waldon acknowledged that she was provided a list of 150 jobs available with Respondent, but none were of equivalent salary. She was only qualified for one accountant position in the Western Division but did not want to relocate, and did not apply for any of the job postings.

In sum, I find and conclude that Ms. Waldon has failed to establish that her alleged protected activities were a contributing factor in Respondent's decision to include her in the RIF. Therefore, Respondent does not have a burden to establish by clear and convincing evidence that it would have taken the same action in the absence of her alleged protected activity and that it had a legitimate purpose and motive for its actions. Even if Respondent could not show clear and convincing evidence, which I find it has, Ms. Waldon has not established that her placement on the RIF list was a pretext for discrimination because she has not shown the reason for placement, i.e., her agreed-upon separation date, was false **and** that discrimination against her for her alleged protected activity was the real reason for Respondent's actions.

Accordingly, I find and conclude that the complaint allegations of Ms. Waldon that she was discriminatorily selected for a reduction in force has not been established and thus her complaint is hereby **DENIED**.

V. CONCLUSION

For the reasons discussed above, I find and conclude that Complainants failed to present convincing evidence to establish that they engaged in protected activity within the meaning of the SOX Act or that they were subjected to any adverse employment actions by Respondent because of their alleged protected activity or that Respondent's proffered reasons for the elimination of the QA representative functions and their reduction in force were a pretext for discriminatory retaliation. Based on the foregoing analysis, I further find and conclude that Respondent eliminated the position of QA representative and reduced in force Ms. Allen, Ms. Breaux and Ms. Waldon for legitimate business reasons and not because of their alleged protected activity.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, Respondent did not unlawfully discriminate against Ms. Patricia Allen, Ms. Dana Breaux and Ms. Laura Waldon because of their alleged protected activity and, accordingly, their Complaints are hereby **DISMISSED**.

ORDERED this 15th day of February, 2005, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board (Board), U. S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210, and within 30 days of the filing of the petition, the Board issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U. S. Department of Labor, Washington, DC 20210. See 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).